Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

ALLAN ELIAS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the District Court lacked jurisdiction over the Resource Conservation and Recovery Act (RCRA) criminal charges because the federal RCRA laws had been replaced and supplanted by Idaho's own hazardous waste laws, pursuant to 42 U.S.C. § 6926(b)?

2. Whether the Government must prove that a sample from a large body of material is representative of the entire body in order to prove that a characteristic waste is a hazardous waste, subject to RCRA regulation?

3. Whether the Government's departure from a longstanding and consistently applied administrative practice, which would have determined that the material at issue was not a hazardous waste, violates the Constitutional fair notice requirement?

4. Where the defendant has shown jury tampering to have occurred during trial, is it the Government's burden to show no juror prejudice, or is it the defendant's burden to show actual juror prejudice?

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I. PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Allan Elias respectfully requests that this Court issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

II. OPINIONS BELOW

Respondent United States charged Petitioner Allan Elias with various environmental crimes stemming from an industrial accident in which a worker was seriously injured. The district court filed an initial opinion relating to Petitioner's pre-trial "fair notice" arguments on March 18, 1999. App:80. After the trial, but before sentencing, Petitioner filed a motion to dismiss based on lack of jurisdiction. The district court initially granted the motion with respect to certain counts in an opinion dated March 16, 2000 (App:58), but subsequently modified that opinion in an opinion dated April 26, 2000 (App:70). The Ninth Circuit affirmed the district court decision (save for one issue not relevant here) in an opinion reported at 269 F.3d 1003 (9th Cir. 2001). (App:1).

III. JURISDICTION

While jurisdiction is one of the subjects of this Petition, the district court exercised jurisdiction over the matter as a federal criminal case pursuant to 18 U.S.C. § 3231. The district court entered its judgment on May 5, 2000, and Petitioner filed a notice of appeal the same day. The Ninth Circuit, which had jurisdiction pursuant to 28

U.S.C. § 1291 and 18 U.S.C. § 3742, entered its decision on October 23, 2001. Petitioner's timely filed Petition for Rehearing was denied on January 4, 2002. (App:127). This Petition is timely filed, and this Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

IV. STATUTES AND REGULATIONS INVOLVED

Sections 6926 and 6928 of Title 42 of the United States Code are set forth in their entireties at App:128 and App:133, respectively. The relevant portions of sections 260.10 and 261.23 of Title 40 of the Code of Federal Regulations are set out at App:141 and App:142, respectively.

V. STATEMENT OF THE CASE

A. RELEVANT FACTS.

Elias operated Evergreen Resources, Inc. ("ERI"), a small fertilizer manufacturing operation in rural Idaho. On August 25, 1996, he asked two ERI employees (Darren Weaver and Scott Dominguez) to clean out a 25,000-gallon storage tank and empty its contents onto the ground. On August 26, 1996, Weaver and Dominguez entered the tank and began cleaning it, but left after approximately 30-45 minutes. The next morning, Elias directed that the employees complete the cleaning of the tank. After an hour of cleaning, Dominguez hit a pocket of cyanide, cyanide gas was emitted, and he collapsed. Weaver escaped without suffering any permanent injuries. Dominguez was rescued from the tank and airlifted

to the hospital. He regained consciousness, but had suffered serious brain damage.

Before 1990, the storage tank *had* been used as a cyanide leaching vat at Elias's former business, AEI, Inc. AEI had added sodium cyanide to the tank to extract silver from mineral-bearing materials. At that time, no RCRA permit was required. No sodium cyanide was placed in the tank after 1989.

In the early 1990s, Elias brought the tank to ERI, where it was used as an overflow tank. Substantial quantities of phosphoric acid, as well as other substances used in the manufacture of fertilizer, were placed in the tank during its tenure at ERI.

After the accident, federal and State investigators arrived on the scene and took samples of material on the ground and material in the tank from areas within a three-foot radius of a small hole in the tank. (Tr. 3002-3003.) No effort was made to take representative samples from other sections of the 36-foot tank. (Tr. 3020-3026.)

The samples were sent to a federal government lab for testing. The lab tested the material for cyanide, utilizing the EPA's published test for determining whether material contained hazardous levels of cyanide.[1] The SW-846 test showed that the material extracted from the tank was ***not*** a hazardous waste, with results far below

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[1] The test for cyanide reactivity set out in 1996 and prior versions of "Test Methods for Evaluating Solid Waste, Physical/Chemical Methods," EPA Publication SW-846 ("SW-846").

the published threshold. (Tr: 3403-3409.)[2] A second round of testing at another government laboratory yielded similar results. (Tr:3408-3409.)

B. PROCEEDINGS IN THE DISTRICT COURT.

In 1996, Idaho was an authorized state, with EPA approval to establish, administer and enforce its own hazardous waste laws under 42 U.S.C. § 6926(b). Idaho's hazardous waste law included, at the insistence of the EPA, criminal enforcement provisions that were acceptable to the EPA. 40 C.F.R. § 272.651(b)(2). Nevertheless, in this case, the government charged Elias with three federal environmental crimes: two counts of storage or disposal of a hazardous waste without a permit, pursuant to 42 U.S.C. § 6928(d)(2), and one count of "knowing endangerment," pursuant to 42 U.S.C. § 6928(d)(2). (Tr:697-726.) While these counts carry maximum penalties of five and fifteen years, respectively, under Idaho law, the maximum punishment for environmental crimes is one year. Idaho Code § 39-4415.

To prove at trial that the material was legally hazardous, the Government abandoned the SW-846 test published and approved by the EPA. Instead, its expert, Dr. Lowry, used a new test to establish that the material

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[2] In fact, the results of the Government's SW-846 tests indicated that the material contained on average less than 2 *ppm* of releasable cyanide, while the published threshold for cyanide is 250 *ppm*.

contained releasable cyanide slightly in excess of the regulatory threshold of 250 ppm.[3]

Prior to trial, Elias challenged the use of the new test on fair notice and vagueness grounds. However, the Government convinced the District Court that the old, EPA-approved test was only *one possible* method for determining whether the waste was hazardous. (CR:105.)

To establish that the material was legally hazardous, it was necessary to establish that a "representative sample" of the material was hazardous. The test samples consisted of two to three grams, taken from the ground adjacent to a small hole in the tank, and from material within the tank that could be reached by extending a device approximately three feet through the small hole. The EPA made no attempt to take representative samples of the entire two to three tons of material that had accumulated at the bottom of the tank (which formed the basis for the storage charge), or from the substantial amount of material outside the tank (which formed the basis for the disposal charge). Moreover, in his testimony, Lowry admitted that material like that in the 36-foot long, 25,000-gallon storage tank is not homogeneous. (Tr:3002-3003, 3020-3026.)

Lowry's test results themselves illustrated the non-representative nature of the samples. The pH of sample tested by Lowry was 2.5 to 3, while the pH of the material

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[3] In 1993, the Government's expert witness, Dr. Lowry, an EPA scientist, had attempted to convince the EPA that the SW-846 test should be replaced by a purportedly superior test (his own). (Tr:3409.) Nevertheless, when SW-846 was reissued in 1996, it contained the old SW-846 test. (Tr:3410.)

taken from the clothes of employees in the tank was 8. (Tr:1371, 2981.) These widely disparate pH levels indicate that the material Lowry tested may have differed dramatically from material in other parts of the tank.

Lowry's position at trial was *not* that the samples were representative, but rather that, in his opinion, there was no requirement that the samples be representative of the entirety of the material in the tank:

> Well, representative doesn't matter, it's relative to the analyte that you are looking at and the circumstance that you are talking about. A sample that may be representative for one purpose may not be representative for another purpose. This in an acute exposure, any amount, most any amount of waste in there is going to cause problem in a tank. (Tr:3010.)

The Government likewise argued that even if only 1 sample out of 100 showed that a material was hazardous and the other 99 showed it was not, the material would still be legally hazardous. (Tr:3058-3059.) Thus, in the Government's view, if ***any portion***, not just a representative sample, of the material showed unacceptable levels of cyanide, the entirety was a "hazardous waste."

Elias made a Fed.R.Crim.P. 29 motion, based in part on the failure of the Government to prove that a representative sample of the material was a reactive cyanide waste. (Tr:3597-3633.) The District Court denied that motion. (Tr:4219-4220.)

The jury convicted Elias on all counts.

After trial, Elias moved to dismiss the 42 U.S.C. § 6928(d)(2) and (e) counts for lack of jurisdiction because

the federal Resource Conservation and Recovery Act (RCRA) provisions were supplanted by State law.

The District Court initially issued an opinion agreeing that the "in lieu of" language of § 6926(b) meant that Idaho law supplanted federal RCRA provisions, but only those that had a State-law counterpart. It therefore ruled that the two counts of the Indictment (Counts II and III) that charged violations of 42 U.S.C. § 6928(d)(2) were improper, but ruled that the 42 U.S.C. § 6928(e) count was proper because there was no Idaho State analogue. (CR:261.) On reconsideration of its ruling, the court held that Elias had actually been convicted of violations of Idaho State criminal statutes, but that EPA regulations had conferred federal jurisdiction over Idaho law violations. (CR:276 at 7.)

Approximately one month after the trial, the jury foreman, Boyd Greenlee, told the prosecutors that during the trial, he and other jurors were told by Juror Janet Scott that Elias approached her and said, "What will it take to buy you off?" (CR:231 at 2.) (6/23/99 Tr:5).

Because one of the jurors believed during the course of the trial that Elias had attempted to bribe another juror, Elias moved for a new trial. The district court conducted a *Remmer* hearing, taking testimony from most of the jurors, and found that (1) Juror Scott had *not* told the other jurors that Elias had attempted to bribe her; (2) "Elias has made out a prima facie case of jury tampering and is entitled to a presumption that he was prejudiced thereby;" (3) "the Court cannot find that Greenlee treated the incident as a joke and ignored it in his deliberations;" and (4) "It is also difficult to understand how a trial could

pass muster under the Sixth Amendment when one juror perceived that the defendant tampered with the jury." (CR:231 at 1, 10, CR:254 at 6.)

Rather than ordering a new trial, the court ordered a second hearing, at which not only Greenlee but a second juror claimed to have heard about the attempted bribe. The District Court found that the two jurors had misunderstood Juror Scott's report of Elias's greeting to her as a suggestion of bribery, but had understood the whole matter to be in jest. The District Court denied Elias' motion for new trial. (CR:260.)

Elias was sentenced to 204 months in prison. (App:45).

C. PROCEEDINGS IN THE NINTH CIRCUIT.

The Ninth Circuit Court of Appeals affirmed the District Court. With respect to the jurisdictional argument, the Ninth Circuit held that the criminal penalties of § 6928(d)(2) and (e) continue to be applicable even after the Idaho State program was authorized by the EPA, and administered and enforced by the State of Idaho, pursuant to § 6926(b). 269 F.3d at 1009-1013.

The Ninth Circuit rejected Elias' "fair notice" argument, which challenged the Government's decision to abandon the SW-846 test to prove legal hazardousness, as well as Elias's argument that the government had failed to prove that a "representative sample" of the entire material being stored and/or disposed of was legally hazardous. 269 F.3d at 1013-1017.

The Ninth Circuit affirmed the District Court's denial of Elias' motion for new trial. The court of appeals held that "the district court's conclusion that *Elias had not borne his burden* of showing juror bias appears correct." 269 F.3d at 1021 (emphasis supplied, footnote omitted.) Thus, the Ninth Circuit held that the defendant has the burden of showing that jurors were prejudiced against him as a result of the perceived bribery attempt. However, the Court of Appeals remained mystified as to what actually happened: "By far, the most difficult thing to understand is how, if Scott merely said that Elias had greeted her, two people came to believe he had suggested a bribe, jokingly or otherwise. There is no satisfactory explanation." 269 F.3d at 1020-1021.

VI. REASONS FOR GRANTING THE WRIT

A. This Court Should Resolve The Issue As To Whether There Is Federal Jurisdiction Over Violations Of State Permitting Requirements After State Authorization Pursuant to 42 U.S.C. § 6926(b).

The Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6901 *et seq.*, is one of a group of federal statutes that establish complimentary federal and State roles in environmental protection, often referred to as "cooperative federalism."[4] While RCRA establishes standards for the handling and disposal of solid waste, an important feature of this Act is that authority over the

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[4] See Adler, Jonathan, "The Green Aspects of Printz: The Revival of Federalism and Its Implications for Environmental Law," 6 GEO MASON L. REV. 573, 575-582 (1998).

administration of the standards is designed to devolve to the States. States may opt out of the federal RCRA program, provided that (1) the State adopts laws that are at least "equivalent" to the federal law; and (2) the program is approved by the EPA. 42 U.S.C. § 6926(b). Section 6926 provides that a State that meets these conditions may elect to establish, administer, *and enforce* its own hazardous waste management law "in lieu of the federal program under this subchapter." 42 U.S.C. § 6926(b).[5] The Supreme Court has previously interpreted this "in lieu of" language to mean that federal RCRA statutes were "subject to displacement by an adequate state counterpart," and that an authorized State hazardous waste management program consists of "state laws enacted to supplant those federal statutes [RCRA]." *Department of Energy v. Ohio*, 503 U.S. 607, 611-612 (1992).[6]

To obtain EPA approval, an authorized program must include not only substantive rules, but it must also include the authority to seek civil and criminal penalties.

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[5] The legislative history of RCRA confirms that it was Congress' intent that States be afforded the opportunity to handle enforcement of waste management rules. "[T]he States are to have primary enforcement authority and if at any time a State wishes to *take over* the hazardous waste program it is permitted to do so, provided that the *State laws* meet the Federal minimum requirements for both *administering and enforcing* the law." (Emphasis supplied.) H.R. Rep. No. 94-1491 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6238, 6262

[6] *See also, Bragg v. West Virginia Coal Ass'n*, 248 F.3d 275 (4th Cir. 2001), *cert. denied*, January 22, 2002, (analysis of the contours of the federal/state partnership created under the Surface Mining Control and Reclamation Act, which contains analogous State primacy provisions).

40 C.F.R. § 271.16. After the EPA approved Idaho's hazardous waste management program in 1990, Idaho operated its program, including the civil and criminal enforcement provisions (*See* 40 C.F.R. § 272.651(b)(2)), "in lieu of the Federal program under this Subchapter . . . and to issue and enforce permits . . . ."[7]

The Ninth Circuit's reading of § 6926(b) to provide for a continued general federal enforcement role over state permitting violations is squarely contrary to the Eighth Circuit's opinion in *Harmon Industries, Inc. v. Browner*, 191 F.3d 894 (8th Cir. 1999) (App:145), which held:

> While the EPA is correct that the "in lieu of" language refers to the program itself, the administration and enforcement of the program are inexorably intertwined.
>
> The RCRA gives authority to the states to create and implement their own hazardous waste program. The plain "in lieu of" language contained in the RCRA reveals a congressional intent for an authorized state program to supplant the federal hazardous waste program in all respects, including enforcement.

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[7] Congress provided the federal government with certain limited powers, even in authorized States, to ensure that such States meet RCRA's goals of protecting human health and the environment. *See Washington v. EPA*, 752 F.2d 1465, 1466-1467 (9th Cir. 1985) (setting forth limited powers retained by EPA post-authorization). *Also see Wyckoff Company v. EPA*, 796 F.2d 1197 (9th Cir. 1986) (42 U.S.C. § 6934, which provides EPA with emergency oversight powers, survives authorization).

191 F.3d at 899 (App. 152).[8] The issue as to the extent of federal enforcement authority subsequent to State authorization is also currently pending before the Tenth Circuit in *United States v. Power Engineering, et al.*, Docket No. 01-1217 (oral argument held March 20, 2002).

The Ninth Circuit construed the phrase "without a permit *under this subchapter*" (an element of the offense in this case) to include both federal permits and state permits issued under § 6926(b) state authorized programs. 269 F.3d at 1012. This is contrary to the Second Circuit's interpretation of the federal jurisdiction afforded under virtually identical language in the "citizen suit" provisions of 42 U.S.C. § 6972(a)(1)(A). In *Dague v. City of Burlington*, 935 F.2d 1343, 1352 (2d Cir. 1991), *rev'd in part on other grounds*, 505 U.S. 557 (1992), the Second Circuit considered whether permitting requirements under authorized State programs constituted requirements effective *"pursuant to this chapter"* for purposes of the federal jurisdiction afforded under § 6972(a)(1)(A), and concluded that no federal jurisdiction was available under § 6972(a)(1)(A) because the programs adopted by the States were not "pursuant to this [federal RCRA] chapter."[9] The Second Circuit held the phrase "pursuant

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[8] The District Court in *Harmon* noted that the "concept of co-existing enforcement powers is inconsistent with EPA's delegation of authority and legislative history." *Harmon Industries, Inc. v. Browner*, 19 F. Supp.2d 988, 995 (W.D. Mo. 1998).

[9] While most courts have held that there is no federal jurisdiction over citizen suits after state authorization, some courts have held that federal jurisdiction continues. *Compare Thompson v. Thomas*, 680 F. Supp. 1, 3 (D.D.C. 1987); *Clorox Co. v.*

to this chapter" excludes state permitting programs, while the Ninth Circuit ruled that the virtually identical phrase "under this subchapter" includes State permitting programs.

Supreme Court review of this issue is also important because it affects a vast number of businesses that produce hazardous waste, which are potentially subject to federal criminal or civil penalties.

1. The Statutes Charged In This Case Are Predicated On Permitting Violations "Under This [RCRA] Subchapter." Because Federal Law Was Supplanted Pursuant To § 6926, There Could Be No Violation Of Permitting Requirements "Under This [RCRA] Subchapter" In Idaho.

With respect to which laws must be enforced, and who is to enforce those laws, § 6926 provides that, after EPA approval of a State plan, a State is authorized to administer and enforce the State's hazardous waste management law, in lieu of the "federal program *under this subchapter*." The "subchapter" referred to is subchapter III of Chapter 82, which includes not only the substantive provisions, but also § 6928(d)(2) and (e), the violations charged in this case.

Chromium Corp., 158 F.R.D. 120, 123-124 (N.D. Ill. 1994); *Orange Environment, Inc. v. County of Orange*, 860 F. Supp. 1003, 1020 (S.D. N.Y. 1994); *City of Heath, Ohio v. Ashland Oil, Inc.*, 834 F. Supp. 971, 978-979 (S.D. Ohio 1993) *with Sierra Club v. Chemical Handling Corp*, 824 F. Supp. 195 (D. Colo. 1993) and *Glazer v. American Ecology Environmental Services Corp.*, 894 F. Supp. 1029, 1039 (E.D. Tex. 1995).

That § 6928(d)(2) is applicable only to violations of permitting requirements under federal law and regulations is confirmed by examining the language of the criminal statute in juxtaposition with the language of the State opt-out provision (§ 6926). Section 6928(d)(2)(A) makes it a crime to dispose of hazardous waste "without a permit under this subchapter," and § 6926(b) provides that approved State programs, including the State's enforcement provisions, operate in lieu of the federal program "under this subchapter." Because Congress used an identical phrase ("under this subchapter") in two statutes in the same act, that phrase must be afforded the same meaning in both places. *See Commissioner v. Keystone Consol. Industries*, Inc., 508 U.S. 152, 159 (1993). Just as the remainder of the laws and regulations that constitute the federal program under Subchapter III are supplanted by State "equivalents" under § 6926(b), the federal permitting crime at issue here (§ 6928(d)(2)(A)), keyed to violations of Subchapter III of RCRA, likewise, has no applicability if a State program, including required enforcement provisions, has supplanted the federal Subchapter III program.

2. State Authorized Programs Do Not "Arise Under Federal Law," Nor Are They Enacted Pursuant To The Delegation Of Federal Authority. Disposing Of Waste Without An Idaho Permit Does Not Amount To A Violation "Under This [Federal] Subchapter [III]" For Purposes Of § 6928(d)(2)(A).

In *Department of Energy v. Ohio*, 503 U.S. 607, 624 (1992) ("*DOE*"), this Court ruled that penalties imposed

pursuant to State environmental statutes approved by the EPA and supplanting federal law, were not penalties "arising under federal law." *DOE*, 503 U.S. at 624-625.[10] The Court noted that even when a State's exercise of power is expressly enabled by federal law, the rights and liabilities created thereunder by State law do not "arise under federal law." *DOE*, 503 U.S. at 625-626.

Section 6928(d)(2)(A) proscribes disposal of hazardous waste "without a permit under this subchapter." In this case, any permitting requirement was imposed by Idaho law. As *DOE* teaches, Idaho substantive environmental law does not "arise under" federal RCRA law. Idaho permitting requirements are not imposed "under this [federal] subchapter" for purposes of § 6928(d)(2)(A). Thus, disposal of waste without a permit required by Idaho law is not a federal crime under § 6928(d)(2)(A).[11]

If the State permitting programs were programs "under the [federal] subchapter," they would presumably be programs enacted pursuant to delegated authority.

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[10] Had the Ohio State "Clean Water Act" penalties arisen "under federal law," the federal agencies would have been obligated to pay them. The CWA and RCRA have similar state authorization provisions. *DOE*, 503 U.S. at 611.

[11] In a case decided prior to *DOE*, the First Circuit concluded that a State program was a program "under this [federal] subchapter." *United States v. MacDonald & Watson Waste Oil Co.*, 933 F.2d 35, 44-45 (1st Cir. 1991). This decision is contrary to the teaching of *DOE*, which holds that penalties imposed by State programs are not penalties "arising under" federal RCRA law. Moreover, *MacDonald* failed to address the "in lieu of" language, and its effect upon § 6928 enforcement authority.

However, all of the courts to address the question of whether RCRA has "delegated" rulemaking authority to the States have concluded that "State permit programs are 'not a delegation of Federal authority,' but instead are independent State laws which 'function . . . in lieu of the federal program.' " *State of California v. U.S. Dep't of the Navy*, 845 F.2d 222, 225 (9th Cir. 1988). Indeed, such a delegation would violate fundamental principles of the Constitutional framework. *See e.g., Manus River Preservation Committee v. EPA*, 541 F.2d 899, 903 (2d Cir. 1976) ("By the contemplation of minimum federal standards [of the Clean Water Act], however, Congress did not intend to relegate the States to the status of enforcement agents for the executive branch of the federal government.")[12]

Had this case been brought under Idaho law, Elias would have faced a maximum sentence of one year for

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[12] If authorized States were merely established and enforcing their idiosyncratic versions of federal law pursuant to a Congressional "delegation" of authority, such a system would be an impermissible delegation of federal executive power to the States:

> The Constitution does not leave to speculation who is to administer the laws enacted by Congress. . . . The insistence of the Framers upon unity in the Federal Executive – to insure both vigor and accountability – is well known. That unity would be shattered, and the power of the President subject to reduction, if Congress could act as effectively without the President as with him, by simply requiring state officers to execute its laws.

Printz v. United States, 521 U.S. 898, 922-923 (1997). If the State programs were viewed as creatures of federal law, subject to enforcement by the States, as well as the EPA and the DOJ, the unity of the Federal Executive would be fragmented.

each violation, rather than the five and fifteen year maxima of § 6928. Idaho Code § 39-4415. If § 6928(d)(2) and (e) continue to exist in a State with an authorized State program, prosecutors would be free to charge violations of the same substantive State law at the State and/or federal level. That is, nothing would prevent federal authorities from prosecuting a RCRA offense following a State acquittal or conviction, and vice-versa. Congress cannot have intended that the same conduct, in violation of the same substantive law, potentially gives rise to *two* independent prosecutions with disparate penalties.

B. The Court Should Accept Review To Determine The Scope Of The Government's Requirement To Prove "Representativeness" In Civil And Criminal Environmental Cases.

The Ninth Circuit's holding that no proof of representativeness is required in cases of disposal violations is a radical departure from the standard that has been applied by the EPA, industry, and the courts with respect to all "characteristic wastes" for more than 20 years.[13] Prior cases and rulings have consistently required proof that a sample taken from a larger volume of material adequately represents the average properties of the large

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[13] The regulations provide that solid wastes will be "hazardous waste" if either (1) the waste contains a threshold amount of a specific "listed" chemical, or (2) the waste exhibits one of four defined "characteristics" – ignitability, corrosivity, toxicity and reactivity. 40 C.F.R. §§ 261.3(a)(2); 261.10, 261.20-24. The term "representative sample" is employed in connection with all of the "characteristic wastes" identified in § 261.21 through § 261.24.

volume, whether for storage or disposal, and whether offered by the Government or the regulated party. The Ninth Circuit's ruling exposes regulated industries to vastly expanded civil and criminal liability. Because there is an overriding need for national uniformity on this issue, review by this Court is appropriate.

Pursuant to 40 C.F.R. § 261.23, a waste is a reactive cyanide waste "if a **representative sample** of the waste has *any* of the following characteristics . . . (5) It is a cyanide or sulfide bearing waste which, when exposed to pH conditions between 2 and 12.5, can generate toxic gases, vapors or fumes in a quantity sufficient to present a danger to human health or the environment." (Emphasis supplied.) The regulations define "representative sample" to mean "a sample of a universe or whole (e.g., waste pile, lagoon, ground water) which can be expected to exhibit **the average properties of the universe or whole**." 40 C.F.R. § 260.10 (emphasis supplied). The Government did not offer evidence that a "representative sample" of the material, whether the material in the tank or that on the ground, was a reactive hazardous waste under 40 C.F.R. § 261.23(a)(5), thereby failing to prove an essential element of its case: that a representative sample of the material was a "hazardous waste."[14]

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[14] Because no effort was made to obtain a representative sample, the court abused its discretion by allowing Lowry's test results into evidence. These results were irrelevant to the jury's inquiry as to whether the material was, on average, a hazardous cyanide-bearing reactive waste. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) (expert testimony admitted only if it "will assist the trier of fact to understand the evidence or to determine a fact in issue.").

Noting that there was evidence showing the required level of cyanide reactivity in *one* sample, a portion of which was taken from outside the tank,[15] the Ninth Circuit reasoned that the Government was not required to prove that this one sample was "representative" of the whole body of material inside or outside the tank because the sample *itself*, having the requisite level of reactivity, had been disposed of, constituting a violation. 269 F.3d at 1013-1014.[16] The Ninth Circuit further held that there are two different standards: one if the Government is trying to prove that a hazardous waste has been disposed of or stored in violation of the law (where representativeness need not be proven), and another for waste generators trying to prove that their waste is *not* a hazardous waste. 269 F.3d at 1014.

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[15] The "composite" sample relied upon by the Ninth Circuit was taken from a three-foot area, within and without the tank, near a hole at one end of a 25,000-gallon tank, which contained several *tons* of heterogeneous material, one or more tons of which had been removed and was on the ground. While the Ninth Circuit indicated that "one sample" was taken from outside the tank, this is incorrect. A portion of the composite sample tested came from outside the tank, and there is no indication in the record whether the cyanide was in this portion, from a portion within the tank, or equally distributed.

[16] If the few grams of cyanide-bearing waste tested had been the only material stored or disposed of, Elias would be *exempt* from regulation as a "small-quantity [waste] generator," and he could not be prosecuted for storage or disposal of this limited quantity of material without a permit. 42 U.S.C. § 6921(d)(4) and 40 C.F.R. § 261.5. It is only if these samples are shown to be representative of the larger amounts of material actually stored or disposed of can the Government demonstrate an actionable permitting violation.

The Ninth Circuit's holding is in direct conflict with the literal language of the regulations, as well as the holdings of every court to have addressed the issue of whether "grab" samples constitute sufficient evidence of regulatory violations. For example, in *United States v. WCI Steel*, 72 F. Supp.2d 810, 821 (N.D. Ohio 1999), where the government argued that there was no need to prove that samples reflect the average properties of the whole, the court held:

> As to this issue, the United States' argument would turn 40 CFR § 261.22 and 40 CFR 260.10 on its head. 40 CFR § 261.22 says corrosivity is determined based upon a 'representative sample of the waste.' 40 CFR § 260.10 says the sample must reflect 'the average properties of the universe or whole.' In arguing that this Court disregard the ponds as a whole, the United States pushes aside its own regulation.
>
> The key issue is what sampling method will produce a 'representative sample' of the ponds, and whether the methods used here produce a sufficiently reliable picture of the average properties of the ponds as a whole.

Likewise, *In the Matter of Hallar Enterprises, Inc.*, 1999 WL 118257 (EPA 1999), which the Ninth Circuit curiously cites in support of the proposition that "not every inch of the tank need be inspected," 269 F.3d at 1014, the *Hallar* court actually held:

> Irrespective of whether SW-846 is mandatory or merely advisory, the necessity for a scientifically acceptable method of sampling is not thereby affected. For example, if the waste in the tanks had become stratified, it is questionable whether

> a sample drawn from a single point would be representative of the contents of the tank.

Accord, Renaud v. Martin Marietta Corp., 972 F.2d 304, 308 (10th Cir. 1992) ("Simply put, no one has any idea whether this [single] sample is representative of the 'normal' contaminant concentration.")

As authority for its holding, the Ninth Circuit relied entirely upon an EPA administrative case, *In re Electric Services Co.*, 1 E.A.D. 947 (Env.App.Bd. 1985). However, *Electric Services* dealt with an uncontrolled discharge of Polychlorinated Biphenyls ("PCBs"). Unlike characteristic wastes, with respect to PCBs, the EPA has *no burden* to prove that an uncontrolled discharge is representative of a larger universe or whole. *Any* uncontrolled discharge of PCBs would form the basis of a violation. *See* 40 C.F.R. § 761.123.

Indeed, *Electric Services* expressly distinguished cases where a "representative sample" must be established from those where a single instance of a contaminant, e.g. PCBs, establishes a violation:

> [W]e use representative samples to show the quality or condition of a larger body from which the sample is taken. Thus, if proof of a violation depends on producing evidence that accurately describes some quality or condition of the larger body (for example, its PCB concentration level), a representative sample is essential, for no inferences about the larger body can be drawn from a mere grab sample. In the present case, however, proof of the disposal violations does not hinge on accurately describing the condition or quality of some larger body. Instead, it hinges on proof of an uncontrolled discharge of PCBs.

> Under such circumstances, the sample itself is the uncontrolled discharge, the improper disposal, or, so to speak, the corpus delicti. *Id.* (emphasis supplied).

Accordingly, *Electric Services* provides no support for the Ninth Circuit's novel proposition that representativeness need not be proven in a disposal case.

C. The Supreme Court Should Review This Case To Determine To What Extent An Agency's Departure From Past Practices Violates The Fair Notice Requirement.

The Ninth Circuit's complete disregard of the long-standing and consistently applied testing protocol for determining cyanide reactivity is squarely contrary to decisions in the D.C. Circuit, requiring, especially in cases involving highly regulated industries, that settled administrative practice be taken into account in determining whether there was "fair notice" that defendant's conduct was in violation of the law. The D.C. Circuit has ruled that what must be considered in the "fair notice" analysis for both civil and criminal penalties includes not only the statute and regulations, but also the agency's interpretations:

> If, by reviewing the regulations *and other public statements issued by the agency*, a regulated party acting in good faith would be able to identify, with "ascertainable certainty," the standard with which the agency expects parties to conform, then the agency has fairly notified a petitioner of the agency's interpretation.

General Electric Company v. EPA, 53 F.3d 1324, 1329 (D.C. Cir. 1995) ("*GE*") (emphasis supplied). *See also Rollins Environmental Services v. EPA*, 937 F.2d 649, 653 (D.C. Cir. 1991); *Meehan v. Macy*, 392 F.2d 822, 838-839 (D.C. Cir. 1968) (if an agency affirmatively acquiesces to a given standard over time, it cannot take action against a person whose conduct passes the formerly accepted standard).

It is undisputed that, prior to this accident, the SW-846 test was routinely used by the EPA for all regulatory purposes. Supreme Court review is thus needed to resolve whether and to what extent agency practices must be taken into account for purposes of "fair notice."

1. The Due Process Clause Requires "Fair Notice" To Be Measured By Objective Standards.

Under the due process clause, a criminal statute that either "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute," *United States v. Harriss*, 347 U.S. 612, 617 (1954), or is so indefinite that "it encourages arbitrary and erratic arrests and convictions," *Papachristou v. Jacksonville*, 405 U.S. 156, 162 (1972), is void for vagueness. Where statutory violations are based upon the violation of a *regulation*, and where the regulation at issue is not sufficiently clear to warn a party about what conduct is prohibited, there is no fair notice and the Government may not impose civil or criminal liability. *GE*, 53 F.3d at 1328-1329.

The fair notice requirement is determined by objective standards, *United States v. Kozminski*, 487 U.S. 931, 949-50 (1987), and the test is not whether the operator

actually had prior notice of a specific prohibition or requirement, but whether a reasonably prudent person familiar with the industry would have recognized the specific prohibition or requirement. *Stillwater Mining Co. v. F.M.S.H.R.C.*, 142 F.3d 1179, 1182 (9th Cir. 1998). If the legal standards are unclear, "defendants' actual intent is irrelevant." *United States v. Garber*, 607 F.2d 92, 98 (5th Cir. 1979).

2. Because Material That Passed The SW-846 Test For Cyanide Was Consistently Treated By The EPA As Non-Hazardous, The Government Cannot Prosecute Elias For Storage Or Disposal Of Material That Meets That Standard.

The cyanide-bearing material involved here was subject to regulation only if it was a "reactive waste." In contrast to each of the other three "characteristic wastes," the EPA's definition of "reactive waste" does not employ a scientific test, but relies instead on a narrative definition.[17] A cyanide-bearing waste is hazardous if:

> a representative sample of the waste . . . (5) is a cyanide or sulfide bearing waste which, when exposed to pH conditions between 2 and 12.5, can generate toxic gases, vapors or fumes in a quantity sufficient to present a danger to human health or the environment. 40 C.F.R. § 261.23(a).

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[17] By contrast, the regulations define the other "characteristics" using specific numeric thresholds, and specific testing protocols.

When the regulations defining reactive wastes were finalized, the EPA recognized that the narrative definition offered no numerical test for generators to determine whether their wastes were "reactive," agreeing with commentators who argued that the two test methods set out in the proposed regulations were unreliable and difficult to interpret. 45 FR 33109-33110 (May 19, 1980). However, in 1985, the EPA promulgated an interim test and a numeric threshold for determining whether a material that contained cyanide was a "reactive hazardous waste" and published the test and threshold in EPA Publication SW-846, which is incorporated by reference in the EPA's regulations at 40 C.F.R. § 260.11. The preamble to the Third Edition of SW-846 provides:

> This manual provides a unified, up-to-date source of information on sampling, analytical and QC procedures related to compliance with the RCRA regulations. It brings together in one reference document all of these procedures that have been approved by the Agency for use in the RCRA regulatory program and in determining compliance with the RCRA requirements.

While use of the SW-846 test for releasable cyanide is not *mandated* by the regulation governing reactive waste, it has been systematically employed by industry and the EPA to determine whether a permit is required and/or whether cyanide-bearing material can be "de-listed" as a "hazardous waste." (CR:98 at 22.) For example, the EPA's records show 12 companies, including Bethlehem Steel and USX, whose wastes were de-listed using the SW-846 sulfide/cyanide test. (CR:98 at 22.) (App:192-194.) EPA's steadfast adherence to the SW-846 test as the authorized standard for all other purposes forecloses upon the Government's use of an alternative in this case.

After a tragic accident, the Government should not be able to unilaterally drop its longstanding testing protocol when that test fails to identify a certain material as hazardous, and proffer a "new and improved" test solely in order to convict Elias. The decoupling of the determination of cyanide reactivity levels from prior agency practice sanctioned by the Ninth Circuit in this case encourages arbitrary and discriminatory enforcement: Elias was convicted for storing and disposing of waste that others have disposed of (as "non-hazardous") with EPA's blessing.

D. The Court Should Accept Review To Determine Whether, When Jury Tampering Is Found To Have Occurred, It Is The Government's Burden To Show No Reasonable Possibility Of Prejudice, Or Whether It Is The Defendant's Burden To Establish Prejudice.

The holding by the Ninth Circuit that Elias failed to meet *his burden* in establishing juror bias in a case involving jury tampering is consistent with the holding of the Fifth Circuit in *United States v. Sylvester*, 143 F.3d 923 (5th Cir. 1998), which held that the District Court had discretion to allocate the burden of demonstrating prejudice to a defendant in a jury tampering case.[18] However, these

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[18] The Fifth Circuit in *Sylvester* recognized the holding of *Remmer*, but believed that the rule regarding the allocation of the burden had been modified by the intervening Supreme Court decisions in *United States v. Olano*, 507 U.S. 725, 729-30 (1993) and *Smith v. Phillips*, 455 U.S. 209, 212 (1982). 143 F.3d at 934. The D.C. Circuit in *United States v. Williams-Davis*, 90 F.3d 490, 496-7 (D.C. Cir. 1996), and the First Circuit in *United States*

decisions are in conflict with the holdings of several other Courts of Appeals. *See United States v. Cheek*, 94 F.3d 136, 141 (4th Cir. 1996); *Owen v. Duckworth*, 727 F.2d 643, 646 (7th Cir. 1984); *United States v. Ferguson*, 486 F.2d 968 (6th Cir. 1973), as well as the Ninth Circuit's holding in *United States v. Dutkel*, 192 F.3d 893 (9th Cir. 1998). This Court should grant Certiorari to resolve the conflict.

In the foundational jury tampering case of *Remmer v. United States*, 347 U.S. 227, 229 (1954), this Court held that:

> any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial . . . . The presumption is not conclusive, but *the burden rests heavily upon the Government* to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant.

347 U.S. at 229 (emphasis supplied).

The evidence shows that two jurors believed from the middle of trial and throughout deliberations that Elias made a suggestion of bribery to one of the other jurors. In light of the heinous nature of the statement attributed to Elias,[19] there is at least a reasonable possibility that this

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v. Gomes, 177 F.3d 76, 83 (1st Cir. 1999), though not tampering cases, also suggested that the subsequent Supreme Court cases may have changed the rules relating to the allocation of the burden.

[19] There is certainly a reasonable *possibility* that the two jurors' perception of what Elias had said, whether understood

perception affected the verdict. This Court should grant Certiorari to resolve the conflict between the Fifth and Ninth Circuits, which place the burden of demonstrating prejudice in a jury tampering case with the Defendant, and the Fourth, Sixth, and Seventh Circuits, which allocate the burden of demonstrating no prejudice to the Government.

VIII. CONCLUSION

This Court should grant a Writ of Certiorari.

Respectfully Submitted this 4th day of April, 2002.

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to have been made with a smile or not, would prejudice them against Elias. "Even the words, 'I don't want to take a bribe and will not take one' said with a wink and a smile might well be interpreted to mean exactly the opposite." *United States v. Iaconetti*, 406 F. Supp. 554, 559 (E.D. N.Y. 1976).

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United States Court of Appeals,
Ninth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Allen **ELIAS**, Defendant-Appellant.

No. 00-30145.

Argued and Submitted June 5, **2001**
Filed Oct. 23, **2001**
As Amended Dec. 21, **2001.**

Scott A. Schumacher, John M. Colvin, and Darrell D. Hallett (argued), Chicoine & Hallett, P.S., Seattle, Washington, for the defendant-appellant.

Lois J. Schiffer, Assistant Attorney General, Environment and Natural Resources Division, Betty Richardson, United States Attorney, and Jeffrey C. Dobbins (argued), Attorney, United States Department of Justice, for the plaintiff-appellee.

Appeal from the United States District Court for the District of Idaho; B. Lynn Winmill, Chief District Judge, Presiding. D.C. No. CR-98-00070-BLW.

Before: WALLACE, HALL, and T.G. NELSON, Circuit Judges.

T.G. NELSON, Circuit Judge:

After a three-and-a-half-week trial, a jury convicted Allen **Elias** of four offenses, the most serious of which was disposing of hazardous waste without a permit, knowing that his actions placed others in imminent danger of death or serious bodily injury in violation of 42 U.S.C. § 6928(e). **Elias** appeals on numerous grounds. We

address several of them here and the remainder in a memorandum disposition filed contemporaneously.

I.

BACKGROUND

A. *Offense Conduct*

Allen **Elias** owned Evergreen Resources, a fertilizer company located near Soda Springs, Idaho. In August 1996, **Elias** decided to transfer sulfuric acid from two railroad cars into a stationary 25,000-gallon tank that he had transported to Evergreen from his previous business, AEI.

At AEI, **Elias** had used the thirty-six-foot-long, eleven-foot-high tank as a storage tank for byproducts of a cyanide leaching process he had patented. **Elias** realized that his process resulted in the transfer of cyanide-laced solids into the tank. He admitted, moreover, that there were one to two tons of cyanide-laced sludge left in the tank when he shipped it to Evergreen in the early 1990s. This sludge did not preclude **Elias** from using the tank for some purposes. In 1996, however, **Elias** decided that the sludge, which was hardened and more than a foot deep, had to be cleaned out of the tank before he could store the sulfuric acid in it.

On August 26, 1996, **Elias** ordered four of his employees, Bryan Smith, Gene Thornock, Darrin Weaver, and Scott Dominguez, to enter the tank and wash the sludge out a valve opening in the end. Despite Smith's repeated requests, **Elias** failed to provide any safety equipment for this task. Consequently, Dominguez and

Weaver entered the tank wearing only their regular work clothes. After about fifteen minutes, they realized that the sludge could not be washed out the small hole in the end of the tank, and they exited. Both complained of sore throats and nasal passages.

The next morning, on August 27, 1996, **Elias** met with his employees, who told him of the difficulties of the day before and the health effects they suffered. Smith again insisted on the necessary safety equipment. **Elias** said he would get it, but told his employees to proceed anyway and that he expected the tank to be cleaned out that morning. Although he instructed his employees to "do it by the book," **Elias** provided none of the safety equipment or training needed for them to do so.

After cutting a bigger hole in the end of the tank, Dominguez and Weaver again entered the tank with no safety equipment. About 45 minutes later, after they had emptied about one-third of the sludge through the hole onto the ground, Weaver shouted that Dominguez had collapsed. Thornock and Smith unsuccessfully tried to get Dominguez out of the tank, which had only a 22-inch manhole at the top. When firefighters got to Dominguez, he was in severe respiratory distress and in danger of dying.

After extricating Dominguez, the fire chief asked **Elias** whether cyanide could be in the tank. **Elias** insisted that he had no knowledge of anything in the tank other than water and sludge, which the fire chief understood to mean mud.

After Dominguez was rushed to the hospital in Soda Springs, the treating physician there concluded that the

most likely cause of his condition was cyanide poisoning. He called **Elias** and asked him whether there was a possibility that there was cyanide in the tank, to which **Elias** again replied no. The doctor nonetheless asked the LifeFlight helicopter from Pocatello to bring a cyanide antidote kit to Soda Springs. After the doctor administered it, Dominguez responded positively. Blood drawn while Dominguez was in the Soda Springs hospital revealed extremely toxic levels of cyanide in his body.

The day Dominguez was injured **Elias** told investigators that he had completed a confined space entry permit, although it was "handwritten" and "not very formal." He declined, however, to actually provide the permit to investigators at that time. Early the next morning, **Elias** visited an acquaintance at a nearby company, Kerr-McGee Corp., where he inquired about the requirements for confined space entries and departed with a copy of Kerr-McGee's safety manual, which spelled out the requirements for a confined space entry permit. The permit **Elias** eventually provided investigators stated that it was issued on August 27, 1996, at 10:30 am.

Weeks after Dominguez was injured, **Elias** ordered a new employee to move and bury the same sludge, again without safety precautions.

B. *District Court Proceedings*

Based on this conduct, a grand jury returned a four-count indictment against **Elias**. In Count I, the indictment charged that **Elias** had stored or disposed of hazardous waste without a permit, knowing that his actions placed others in imminent danger of death or serious bodily

injury in violation of 42 U.S.C. § 6928(e), the Resource Conservation and Recovery Act ("**RCRA**"). Counts II and III, which stemmed from events that transpired after Dominguez was injured, charged him with improper disposal of hazardous waste without a permit in violation of 42 U.S.C. § 6928(d). Count IV charged **Elias** with a violation of 18 U.S.C. § 1001 for making material misstatements relating to the confined space entry permit that he alleged was prepared on August 27, 1996. On May 7, 1999, the jury convicted **Elias** on all four counts.

In June 1999, prior to sentencing, counsel for the Government spoke with Boyd Greenlee, the jury foreperson. Greenlee told them that **Elias** had spoken to one of the alternate jurors and asked what it would take to get him off. Counsel for the Government apprized both the court and **Elias**'s counsel of Greenlee's revelation, causing a full evidentiary inquiry to ensue. In October 1999, **Elias** moved for a new trial based on juror bias and perceived jury tampering. The district court denied **Elias**'s motion, having concluded, based on two evidentiary hearings, that because everyone involved thought the incident was a joke, no risk of bias infected the jury's deliberations.

In October 1999, **Elias** also moved to dismiss the three **RCRA** counts in his indictment, asserting that the United States had ceded its criminal enforcement authority to the State of Idaho when the Environmental Protection Agency ("EPA") authorized it to manage a hazardous waste program under **RCRA**. Initially, the district court agreed in part and granted **Elias**'s motion to dismiss Counts II and III. As a result of both parties' motions for

reconsideration, the district court reversed its earlier ruling and reinstated Counts II and III. The district court held, however, that those counts should be amended in order to list Idaho law rather than federal law as a basis for the charges.

On April 28, 2000, the district court sentenced **Elias** to 204 months in prison and ordered him to pay $6.3 million in restitution. **Elias** appeals.

II.

ANALYSIS

A. *Federal Enforcement of **RCRA**'s Criminal Sanctions*

Elias argues that Counts I, II, and III of his indictment must be dismissed because they alleged[1] federal **RCRA** violations, and when the EPA authorized Idaho's hazardous waste program, that program replaced and supplanted federal **RCRA** law, effectively stripping the United States of enforcement authority. **Elias** derives support for his argument from 42 U.S.C. § 6926. That section, which governs "Authorized State hazardous waste programs,"[2] provides in relevant part:

> Any State which seeks to administer and enforce a hazardous waste program pursuant to this subchapter may develop and . . . submit to the [EPA] Administrator an application . . . for authorization of such program. . . . [If the Administrator approves the program,] [s]uch

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[1] As noted above, the district court ordered post-trial that the indictment be amended to reflect violations of Idaho law.

[2] 42 U.S.C. § 6926.

> State is authorized to carry out such program in lieu of the Federal program under this subchapter in such State and to issue and enforce permits for the storage, treatment, or disposal of hazardous waste. . . . [3]

Because Idaho's hazardous waste program was concededly EPA-authorized at all relevant times, the crucial sentence for our purposes is the second one: "Such State is authorized to carry out such program in lieu of the Federal program under this subchapter. . . . "[4] Our task is to reconcile this "in lieu of" language with the language of 42 U.S.C. § 6928, the **RCRA** "Federal enforcement" provision enacted the same year. As its title implies, § 6928 authorizes federal criminal and civil enforcement and penalties.[5]

Elias argues that, pursuant to § 6926, Idaho's authorized hazardous waste program displaced the federal program, leaving no federal crimes and ousting the federal court of jurisdiction. The linchpin of this argument, which the First Circuit flatly rejected in *United States v. MacDonald & Watson Waste Oil Co.*,[6] "is that the term 'program' in § 6926 incorporates the exclusive responsibility to enforce criminal provisions penalizing the disposal of hazardous wastes."[7] Because construing **RCRA**

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[3] 42 U.S.C. § 6926(b).

[4] *Id.*

[5] The portions of 42 U.S.C. § 6928 relevant to this appeal are reproduced in the appendix to this opinion.

[6] 933 F.2d 35 (1st Cir. 1991).

[7] *Id.* at 44.

in this manner contravenes *Chevron*'s[8] dictates as well as **RCRA**'s plain language and legislative history, we reject **Elias**'s argument.

This case bears a striking resemblance to *Wyckoff Co. v. EPA*.[9] The *Wyckoff* defendants unsuccessfully sought to enjoin the EPA from bringing a civil enforcement act against them. On appeal, they argued that because § 6926 "authorizes state programs to be carried out 'in lieu of the Federal program,' Congress intended to revoke the EPA's power to issue [civil compliance orders] where an authorized state program is in effect."[10] We rejected that contention, noting that the EPA did not interpret **RCRA** to cede exclusive enforcement authority to states and that, under *Chevron*, "[i]f the EPA's interpretation of [§ 6926's 'in lieu of' provision] is reasonable, we must defer to the agency's interpretation even if the agency could also have reached another reasonable interpretation, or even if we would have reached a different result had we construed the statute initially."[11] We concluded that the EPA's interpretation was reasonable because we could "discern no clear congressional intent that [§ 6926] be read to disable the EPA from issuing orders under [§ 6934][12] wherever an authorized state hazardous waste

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[8] *Chevron, USA, Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

[9] 796 F.2d 1197 (9th Cir. 1986).

[10] *Id.* at 1199.

[11] *Id.* at 1200 (internal quotation omitted).

[12] A Section 6934 gives the EPA the authority to order the owner or operator of a facility to conduct "monitoring, testing, analysis, and reporting" so the EPA can ascertain the nature and

program operates 'in lieu of the Federal program' "[13] and because "[t]he EPA's conclusion that its power to issue orders under [§ 6934] survives in those states where an authorized state program is operating is plainly consistent with a straightforward reading of the Act."[14]

Wyckoff controls here. But even if it did not, we would arrive at the same conclusion the second time around. As District Judge Timlin cogently argued in *United States v. Flanagan*,[15] § 6928's plain text supports the EPA's interpretation that its enforcement power survives authorization of state programs:

> Section 6928(a) allows the EPA to exercise civil enforcement powers even where a state program is in effect. This demonstrates "that Congress did not intend, by authorizing a state program

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extent of hazards posed by certain hazardous waste facilities. 42 U.S.C. § 6934(a)(2).

[13] *Wyckoff*, 796 F.2d at 1200.

[14] *Id.* at 1201. Here, as in *Wyckoff*, the EPA's interpretation is abundantly clear. The EPA rule authorizing Idaho's program states that "[t]he Agency retains the authority under [§ 6928] of **RCRA** to undertake enforcement actions in authorized states," and that "[w]ith respect to such enforcement action, the Agency will rely on Federal sanctions, Federal inspection authorities . . . rather than the authorized State analog to these requirements. Therefore, the Agency does not intend to codify such authorized Idaho enforcement authorities." Hazardous Waste Management Program Codification of Approved State Hazardous Waste Program for Idaho, 55 Fed.Reg. 50327-01 (December 6, 1990).

[15] 126 F.Supp.2d 1284 (C.D.Cal.2000). Like **Elias**, the *Flanagan* defendants were indicted for criminal **RCRA** violations including treating or storing hazardous waste without a permit. *Id.* at 1285.

> 'in lieu of a Federal program,' to preempt federal regulation entirely." Similarly, Congress intended other criminal enforcement provisions of Section 6928(d) to survive authorization of state programs, which at least indicates a general congressional intent to maintain Federal involvement in criminal enforcement post-authorization. *See* Section 6928(d)(3), (4) & (5) (criminalizing non-compliance with "regulations promulgated by the Administrator (or by a State in the case of an authorized State program) under this subchapter.").[16]

In support of his contrary conclusion, **Elias** cites the Eighth Circuit's decision in *Harmon Industries, Inc. v. Browner.*[17] *Browner* 's statement that "[t]he plain 'in lieu of' language contained in the **RCRA** reveals a congressional intent for an authorized state program to supplant the federal hazardous waste program in all respects including enforcement" lends credence to his argument.[18] Reliance on *Browner,* however, is suspect. In *Browner,* the EPA sought civil penalties against the defendant. While its administrative enforcement action was pending, a state court approved a consent decree between the state and the defendant releasing the defendant from any claim for monetary penalties.[19] The district court held that this release was binding upon the EPA because the state was authorized pursuant to § 6926(b) to operate its own program and because " '[a]ny action taken by a State

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[16] *Id.* at 1287-88 (quoting *Wyckoff,* 796 F.2d at 1200).

[17] 191 F.3d 894 (8th Cir. 1999).

[18] *Id.* at 899.

[19] *Id.* at 897.

under a hazardous waste program authorized under [**RCRA**] [has] the same force and effect as an action taken by the [EPA] under this subchapter.' "[20]

The Eighth Circuit agreed.[21] We agree with *Flanagan*, however, that "*Browner* is not about if, but about when, the United States can bring a civil enforcement action in federal court after it has authorized a state program."[22] Even *Browner* conceded that "[**RCRA**] manifests a congressional intent to give the EPA a secondary enforcement right in those cases where a state has been authorized to act that is triggered . . . if the state fails to initiate an enforcement action."[23] *Flanagan* 's summation is correct: "[T]he position of the Eighth Circuit in *Browner* is not that the federal government loses its civil enforcement power after a state program is authorized. The Eighth Circuit concludes only that the federal government loses its *primary role* in enforcing hazardous waste regulations."[24] Thus understood, *Browner* does not support **Elias**'s contention that federal law is supplanted or that the United States lacks power to try him.[25]

Legislative history also supports the EPA's contention that **RCRA**'s criminal enforcement provisions are

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[20] *Id.* at 897-98 (quoting 42 U.S.C. § 6926(d)) (alterations in original).

[21] *Id.* at 900.

[22] *Flanagan*, 126 F.Supp.2d at 1289.

[23] *Browner*, 191 F.3d at 899.

[24] *Flanagan*, 126 F.Supp.2d at 1289 n. 3.

[25] *Browner* is also suspect for its marked lack of *Chevron* deference.

meant to apply within states having authorized programs, as the First Circuit held in *MacDonald:*

> Prior to the 1984 **RCRA** Amendments – when, as today, **RCRA** provided for state programs which, when federally approved, would be carried out "in lieu" of the federal program, and which authorized the state to issue and enforce permits – the federal penal statute preceding § 6928(d) was worded so as to apply in so many words to violations both of federal and state permitting programs. Thus, the earlier version provided:
>
> Any person who knowingly –
>
> (1) transports any hazardous waste identified or listed under this subchapter to a facility which does not have a permit under section 3005 of this title (or section 3006[26] of this title in case of a State program),
>
> . . . .
>
> shall, upon conviction, be subject to a fine of not more than $25,000 for each day of violation, or to imprisonment not to exceed one year, or both.
>
> The 1984 amendments increased the applicable criminal penalties and simply substituted "under this subchapter" for the references to the specific subsections under which permits, federal and state, may be granted. The new language, "without a permit under this subchapter," subsumed both state and federal permits, as both types are provided for within "this subchapter." The latter did not, therefore, in any way narrow the scope of federal crim nal

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[26] Section 3006 of **RCRA** is codified at 42 U.S.C. § 6926.

> jurisdiction. Nor did the legislative record hint at any intention by Congress to narrow the scope of federal criminal jurisdiction. To the contrary, Congress manifested its desire to retain a strong federal presence.[27] Had Congress intended to impose a hitherto unknown limitation upon the scope of its laws criminalizing permit violations, its intentions would surely have been manifested; for example, § 6928(d) would have been reworded to indicate that it applied only to persons in states lacking an authorized state program.[28]

For these reasons, we conclude that, under **RCRA**, the federal government retains both its criminal and its civil enforcement powers. Contrary to the district court's conclusion, this is true even where a state law counterpart exists, for many of these "counterparts" provide only misdemeanor punishments where federal law prescribes a felony. We believe **RCRA** only contemplates that the federal permitting scheme is supplanted by authorized state ones.[29] Thus, the federal proscription against transporting hazardous waste without a permit remains, as

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[27] Here the *MacDonald* opinion refers to H.R. Conf. Rep. No. 98- 1133, 98th Cong., 2d Sess., Oct. 3, 1984 at 110, reprinted in 1984 U.S. Cong. & Admin. News 5681 and S.Rep. No. 98-284, 98th Cong., 1st Sess., Oct. 28, 1983 at 45, which states that "The Federal government's ability to obtain criminal penalties against generators and other persons who knowingly cause the transportation of hazardous waste to an unpermitted facility is essential to the regulatory scheme." *MacDonald*, 933 F.2d at 45.

[28] *MacDonald*, 933 F.2d at 44-45 (internal quotation marks and citations omitted).

[29] *See United States Dep't of Energy v. Ohio*, 503 U.S. 607, 611, 112 S.Ct. 1627, 118 L.Ed.2d 255 (1992) (noting that "permit program [s]" run by EPA are "subject to displacement by an

does the federal penalty for it. What changes, and what is supplanted by state law, is the definition of hazardous waste and the sovereign from whom generators must obtain the necessary permit originally – in this case, Idaho.[30]

Although the district court's reasoning diverged, it arrived at the same result. We therefore affirm the district court's refusal to dismiss Counts I, II, and III. Although we agree with the Government that the district court erred when it ordered post-trial that **Elias**'s indictment be amended to reflect that he was charged in Counts II and III under Idaho Code § 39-4408(1), we hold that the error was harmless.[31] Neither party was misled, the trial was conducted on the basis of federal law, and in any subsequent prosecution, the judgment of conviction, which states violations of federal law, would control.

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adequate state counterpart"). **Elias**'s argument that *Ohio* implicitly overruled *MacDonald* is not persuasive. Whether displacement of the EPA's permit program also functions to displace federal criminal enforcement under § 6928(d) was not an issue presented to or resolved by the *Ohio* court.

[30] This interpretation does not render the "in lieu of" language meaningless. "Once the EPA authorizes a state program pursuant to Section 6926(b): (1) the EPA ceases issuing permits pursuant to its permit program; (2) the EPA's regulations, for example those respecting the characterization of solid wastes as hazardous and non-hazardous, are supplanted; and (3) the state assumes its position as the primary enforcement authority." *Flanagan*, 126 F.Supp.2d at 1292.

[31] Neither that section nor its federal analog, 42 U.S.C. § 6925(a), are criminal offenses of which one may be convicted.

B. *Representativeness of the Sample*

To obtain convictions on Counts I, II, and III, the Government had to prove that **Elias** transported or disposed of "hazardous waste."[32] The governing regulations provide that "hazardous waste" includes wastes that exhibit the characteristic of reactivity[33] and that "[a] solid waste exhibits the characteristic of reactivity if a representative sample of [it] . . . is a cyanide or sulfide bearing waste which, when exposed to pH conditions between 2 and 12.5, can generate toxic gases, vapors or fumes in a quantity sufficient to present a danger to human health or the environment."[34] A "representative sample" is "a sample of a universe or whole (e.g., waste pile, lagoon, ground water) which can be expected to exhibit the average properties of the universe or whole."[35]

Elias argues that there was insufficient evidence for the jury to convict him of disposing of "hazardous waste" because the Government presented no evidence that the samples it took from a three-foot radius inside the tank and from outside the tank exhibited the average properties of the entire tank. This analysis misses the mark for two reasons. First, it assumes that to prove **Elias** guilty of disposing of hazardous waste, the Government had to

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[32] *See* 42 U.S.C. § 6928(d) and (e).

[33] 40 C.F.R. §§ 261.3(a)(2), 261.20-24.

[34] 40 C.F.R. § 261.23.

[35] 40 C.F.R. § 260.10.

prove that the entire tank was hazardous. That is incorrect. As the EPA's Environmental Appeals Board explained in *In re Electric Service Co.*,[36]

> proof of the disposal violations does not hinge on accurately describing the condition or quality of some larger body. Instead, it hinges on proof of an uncontrolled discharge. . . . Under such circumstances, the sample itself is the uncontrolled discharge, the improper disposal, or, so to speak, the corpus delicti. Therefore, the violations may be established by simply proving two things: (1) that the samples themselves contain [reactive cyanide]; and (2) that the [reactive cyanide] w[as] not disposed of properly, a conclusion which may be inferred from where the [samples] were found.[37]

In this case, EPA investigators took at least one sample from sludge located outside the tank. By definition, therefore, this sludge sample had been disposed of.[38] It was reactive and tested positive for cyanide. No further evidence is necessary. Thus, whether this hazardous sludge sample bears the same characteristics of the tank waste Dominguez had not yet gotten to before he collapsed is legally beside the point.

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[36] 1 E.A.D. 947 (Env.App. Bd.1985), available at 1985 WL 57155.

[37] *Id.*

[38] *See* 40 C.F.R. § 260.10 ("Disposal means the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land . . . so that such solid waste or hazardous waste or any constituent thereof may enter the environment. . . . ").

On a more basic level, we think **Elias**'s hypertechnical interpretation contravenes common sense. As the Government's witness, Dr. Lowery, explained, if the Government or a waste generator is trying to prove the negative, i.e., that cyanide is not present, relying on just one or two samples would be dangerous. Rather, the generator would need to do the more extensive sampling contemplated by the regulations to guard against obtaining a false negative from potentially striated waste. By contrast, if the Government is trying to prove a positive, i.e., that there is cyanide within, "it's not necessary to go to every inch of the tank to see if there's more cyanide there."

This explanation, which the EPA has advanced elsewhere,[39] makes perfect sense. If a sample from one part of the tank contains wastes reactive enough to cause brain damage to someone, there can be no conceivable purpose in sending other people into the tank to extract more samples. Indeed, under these circumstances, retrieving additional samples would actually disserve **RCRA**'s objectives.[40] The district court did not err.

C. *Constitutionally Adequate Notice*

1. *The governing regulation.*

Elias also contends that the EPA regulation that defines what constitutes reactive hazardous waste is so

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[39] *See In re Hallar Enterprises, Inc.*, Docket No. **RCRA**-VI-815- H, 1999 WL 118257(EPA).

[40] *See* 42 U.S.C. § 6902(a) (noting that **RCRA**'s objective is to "promote the protection of health and the environment").

vague as to deprive him of fair notice that his acts were proscribed and thus renders his convictions on these counts unconstitutional. The regulation, 40 C.F.R. § 261.23, provides as follows:

> A solid waste exhibits the characteristic of reactivity [and is thus hazardous waste] if a representative sample of the waste . . . (5) is a cyanide . . . bearing waste which, when exposed to pH conditions between 2 and 12.5, can generate toxic gases, vapors or fumes in a quantity sufficient to present a danger to human health or the environment.[41]

We review de novo whether this regulation is unconstitutionally vague.[42]

The general rule is that "[a] criminal statute is not vague if it provides adequate notice in terms that a reasonable person of ordinary intelligence would understand that [his] conduct is prohibited."[43] However, "if the statutory prohibition involves conduct of a select group of persons having specialized knowledge, and the challenged phraseology is indigenous to the idiom of that class, the standard is lowered and a court may uphold a statute which uses words or phrases having a technical or

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[41] 40 C.F.R. 261.23(a).

[42] *United States v. Weitzenhoff*, 35 F.3d 1275, 1289 (9th Cir. 1993).

[43] *United States v. Martinez*, 49 F.3d 1398, 1403 (9th Cir.1995) (superseded by statute on other grounds).

other special meaning, well enough known to enable those within its reach to correctly apply them."[44]

Title 40 C.F.R. § 261.23 indeed applies to "a select group of persons having specialized knowledge." Accordingly, to analyze whether this regulation is unconstitutionally vague, we must ask whether persons like **Elias**, whose businesses involve use, storage, and disposal of hazardous wastes, would have understood that the tank waste was reactive and thus hazardous. Because "in determining the sufficiency of the notice[,] a statute must of necessity be examined in the light of the conduct with which a defendant is charged,"[45] the question becomes whether a reasonable person in the industry who knew the tank once contained cyanide and who had previously received health complaints from employees working in and around it would have known that the tank materials "presented a danger to human health or the environment."[46]

The district court considered this question carefully in response to **Elias**'s motion to dismiss Counts I-III on void for vagueness grounds. After an evidentiary hearing on the motion, the court concluded that a reasonable

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[44] *Weitzenhoff*, 35 F.3d at 1289 (internal quotation marks omitted) ("Weitzenhoff and Mariani were knowledgeable in the wastewater field and can be expected to have understood what the permit meant. In particular, they should have known that it did not give them license to dump thousands of gallons of partially treated sewage into the ocean on a regular basis.").

[45] *United States v. E.C. Invs., Inc.*, 77 F.3d 327, 331-32 (9th Cir. 1996) (internal quotations marks, alteration, and citation omitted).

[46] 40 C.F.R. 261.23(a)(5).

person in the defendant's circumstances would have known of the "hazardous" nature of a substance without a numerically-quantified, test-based standard. We concur.

As the district court noted, the reactivity definition set forth in 40 C.F.R. § 261.23(a)(5) closely parallels the top three reactive classes of the National Fire Protection Agency, tracks the definition of reactive wastes used by the Chemical Manufacturers Association, and is substantially similar to the classification system used by the United States Navy. The observation sandwiched in the middle seems most pertinent. If the people who make cyanide define reactivity (and thus hazardousness) this way, people who use it may be expected to do so also.

We have, moreover, sanctioned similar language before. For example, in *United States v. Kennecott Copper Corp.*,[47] we held that a law prohibiting "[t]he discharge of oil . . . into or upon the navigable waters of the United States . . . in harmful quantities" was not unconstitutionally vague.[48] We noted that its language, which was neither highly technical nor obscure, was sufficient to put persons on notice of potential criminal liability.[49] We see no reason why, if persons using or transporting oil can be charged with knowing what constitutes a "harmful quantity," persons using cyanide may not be charged with knowing how much cyanide, under certain conditions, may prove "harmful to human health or the environment."

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[47] 523 F.2d 821 (9th Cir. 1975) (omissions in original).

[48] *Id.*

[49] *Id.* at 823.

2. *The SW-486 interim testing protocol.*

The district court concluded that it would be preferable to have some numerically-quantified, test-based standard for determining whether a substance releasing cyanide gas should be deemed hazardous but that this is not possible given the variety of situations and circumstances in which cyanide may exist and pose a hazard. **Elias** contends that quantifying reactivity is possible, and that, during the period in question, the EPA embraced a test that did precisely that. The test methodology to which **Elias** refers was first mentioned in an internal EPA memorandum dated July 12, 1985.[50] This memorandum from the Director of the Characterization and Assessment Division to Solid Waste Branch Chiefs provided as follows:

> Over the past year, we have received many inquiries about how to evaluate wastes for reactivity (§ 261.23(a)(5)). We have initiated a number of studies in this area, and expect to propose a quantitative threshold for toxic gas generation reactivity in December of this year. On an interim basis, however, we feel strongly that wastes releasing more than the following levels of toxic gas should be regulated as hazardous wastes:
>
> Total Available Cyanide: 250 mg HCN/Kg waste

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[50] Memorandum from Eileen Claussen, Director, Environmental Protection Agency Characterization & Assessment Division to Solid Waste Branch Chiefs on "Interim Thresholds for Toxic Gas Generation Reactivity (261.23(a)(5))," (July 12, 1985).

. . . .

> The available cyanide . . . should be measured using the attached draft testing method. Work currently being done . . . may result in significant changes in the subsequent proposed test. However, pending the conclusion of investigations, we recommend use of this draft procedure.[51]

December of 1985 came and went without the EPA ever finalizing a quantitative testing methodology. However, the interim threshold (250 mg HCN/Kg waste) and the draft testing methodology was republished in EPA publication SW-846, which is entitled "Test Methods for Evaluating Solid Waste, Volume IC: Laboratory Manual Physical/Chemical Methods."[52] Although the manual was "intended to provide a unified, up-to-date source of information on sampling and analysis related to compliance with **RCRA** regulations," it also warned that it could not always be used "in rote fashion."[53] It explained that some "situations . . . will require a combination of technical abilities, using the manual as guidance rather than in a step-by-step, word-by-word fashion," and that this "burden on the user . . . is unavoidable because of the variety of sampling and analytical conditions found in hazardous waste."[54]

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[51] *Id.*

[52] Environmental Protection Agency, Office of Solid Waste and Emergency Response, *Test Methods for Evaluating Solid Waste; Volume IC: Laboratory Manual Physical/Chemical Methods*, SW-846, § 7.3.3 (1986).

[53] *Id.* at 1.

[54] *Id.*

The interim threshold and draft testing methodology remained in the SW- 846 manual for thirteen years, until growing dissatisfaction with it prompted the EPA to remove it.[55] It is undisputed that **Elias** did not know of the interim test's existence in 1996, when he ordered his employees to clean the tank. Nonetheless, **Elias** argues that because the waste in his tank would have passed the SW-486 test with flying colors and that without that test, the regulation gives him no guidance at all, he lacked fair notice that the material in the tank was in fact "hazardous."

We reject this argument. As noted above, at the end of the day, the question is whether a reasonable person who knew cyanide had previously been stored in the tank and who was aware of previous health complaints by those working with or near the substance would have known that the sludge in **Elias**'s tank was dangerous to human health. The uncontroverted evidence is that they would have – despite the apparent vagueness of the terminology, those in the industry apparently understand what it means. Thus, even without the guidance of the

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[55] *See, e.g.*, Joe Lowery, Chief, Chemistry Branch, Environmental Protection Agency, "Releasable Cyanide; Dysfunctional Regulation" (paper presented at 8th Annual Waste Testing & Quality Assurance Symposium, Arlington, VA, July 13-17, 1992, urging withdrawal or modification of SW- 846 guidance); Memorandum from Diana Love, Director, EPA National Enforcement Investigations Center to David Brussard, Director, EPA Hazardous Waste Identification Division, OSWER (Feb. 18, 1998) (urging the Office of Solid Waste to withdraw guidance); Memorandum from David Brussard to Diana Love (April 1998) (withdrawing guidance).

SW-486 test, 40 C.F.R. § 261.23(a)(5) is not unconstitutionally vague.

Even if we presume that, unlike **Elias**, a reasonable person in the industry would have known of the interim testing protocol, it does not follow that he or she would have been so confused by the interplay between the regulation and the SW-486 test as to lack fair notice of what is hazardous. As the district court concluded, the interim threshold did not provide a "safe harbor" for waste that emitted toxic gas below the threshold level. It did not purport to tell waste generators a level *below which* their substances were non-hazardous; it simply told them a level *above which* they definitely were: "On an interim basis . . . we feel strongly that wastes releasing more than the following levels of toxic gas should be regulated as hazardous wastes."[56]

D. *Mens Rea* Instruction

Elias argues that we must reverse his convictions because Jury Instruction 26 misstated the *mens rea* applicable to his offenses. Whether a jury instruction misstated elements of a statutory crime is a question of law the court normally reviews de novo.[57] However,

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[56] Memorandum from Eileen Claussen, Director, Environmental Protection Agency Characterization & Assessment Division to Solid Waste Branch Chiefs on "Interim Thresholds for Toxic Gas Generation Reactivity (261.23(a)(5))," (July 12, 1985).

[57] *United States v. Armstrong*, 909 F.2d 1238, 1243 (9th Cir. 1990).

> [d]e novo review . . . is only available when a proper objection has been made in the district court. Federal Rule of Criminal Procedure 30 prohibits a party from assigning error unless that party objects thereto before the jury retires to consider the verdict, stating *distinctly* the matter to which that party objects and the *grounds* of that objection.[58]

Elias failed to make such a distinct objection. He did object to the court's failure to give his proposed jury instructions and "to the Court's instructions that are being given to the extent they are inconsistent with the ones that we have submitted."[59] As this court held in *United States v. Klinger*,[60] however, such a global objection is simply not enough: "Rule 30 . . . requires that a defendant object with adequate specificity – an objection must state distinctly the matter to which the party objects as well as the grounds of the objection. A defendant's mere proposal of an alternate instruction does not satisfy Rule 30's standard of specificity."[61] Because **Elias** failed to

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[58] *Id.* at 1243 (internal quotation marks omitted).

[59] **Elias**'s counsel then went on to make several specific objections to particular instructions and/or omissions. Ironically, the Government specifically objected to Jury Instruction 26, arguing that the court should have included even more language than it ultimately did. It did so, moreover, immediately before **Elias** had an opportunity to state his objections.

[60] 128 F.3d 705 (9th Cir. 1997).

[61] *Id.* at 710 (internal quotation marks, alteration, and citations omitted). The court stated that "Klinger's mere proposal of an alternate definition of 'knowingly' was inadequate to preserve the challenge he now makes on appeal." *Id.* at 711.

properly object to Jury Instruction 26, we review his objection to it for plain error.[62]

The instruction provided as follows:

> In determining whether the defendant knew that his conduct placed another person in imminent danger of death or serious bodily injury, you are instructed that a person's state of mind is knowing with respect to (A) his conduct, if he is aware of the nature of his conduct; (B) an existing circumstance, if he is aware or believes that the circumstance exists; or (C) a result of his conduct, if he is aware or believes that his conduct is substantially certain to cause danger of death or serious bodily injury.
>
> . . . .
>
> The government does not need to show that the defendant actually intended to harm or endanger any person.

Elias objects to the very last sentence. He asserts that telling the jury he did not have to "actually intend[ ]" harm likely confused the jury because, according to his reading of the Restatement (Second) of Torts, "knowledge that there is a 'substantial certainty' that a given result will occur as a result of one's conduct is equated under the tort law with 'intention' to achieve that result."[63] He notes, too, that according to La Buy's Manual of Jury Instructions in Federal Criminal Cases, the law has long recognized that "[i]n determining defendant's intention, the law assumes that every person intends the natural

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[62] *Id.* at 710.

[63] Restatement (Second) of Torts § 825, § 8A.

consequences of his voluntary acts or omissions."[64] Thus, **Elias** argues that the last part of Jury Instruction 26 told the jury that the Government did not have to prove the very thing the first part told them it did.

Although there is potential for confusion here, it does not rise to the level of plain error because it is confusion that would only afflict law students or lawyers. The jury was not instructed on the Second Restatement of Torts. Nor was it apprized of the principle that intent equals the natural consequences of voluntary acts. Indeed, intent was not defined at all.[65] For this reason, we must assume that the jury understood "intend" to mean what the dictionary says it does: "to have in mind as a design or purpose."[66] So understood, there is no conflict between the two parts of the instruction. The first part set the bar. The jury had to find that **Elias** believed his conduct was "substantially certain to cause danger or death or serious bodily injury." The second part told the jury that **Elias** didn't have to have ordered his workers into the tank for the "design or purpose" of hurting them. In other words, harming the workers did not have to have been **Elias**'s objective in order for him to be guilty as charged. While this instruction is not a model of clarity, and we would not advise its use in the future, it was not plainly erroneous.

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[64] W. La Buy, Manual of Jury Instructions in Federal Criminal Cases § 403 (1963), *reprinted in* 33 F.R.D. 523 (1963).

[65] **Elias** did not request a specific definition of intent.

[66] Webster's Third New Int'l Dictionary 1175 (1986).

E. *Juror Bias and Perceived Jury Tampering*

The jury convicted **Elias** on May 7, 1999. On June 16, 1999, the Government prosecutors conducted a telephone conference with the jury foreperson, Boyd Greenlee, to discuss the trial. During that conference, Greenlee told the prosecutors that during the trial, he had heard from another juror, whom the parties later determined was alternate juror Scott, that **Elias** had approached her and asked her what it would take to buy her off. The prosecutors immediately informed the court of Greenlee's statements and notified defense counsel.

On July 2, 1999, the district court held the first of two evidentiary hearings on this matter. The hearing occurred in chambers with each of the available jurors called one at a time, placed under oath, and questioned by the court. During the court's questioning, Greenlee stated that during the "middle of the trial," another juror told her fellow jurors, including him, that **Elias** had "approached" her and asked her "what would it take to turn her decision." At another point in the court's questioning, Greenlee paraphrased the juror's accusation against **Elias** a bit differently: "She mentioned that [**Elias**] said what would it take to win your vote." When asked by the court, "what was your understanding as to the tone or nature of Mr. **Elias**' remark?" Greenlee responded, "I kind of think maybe he was just joking. I wasn't there, so I didn't hear. This is just hearsay." Seeking to clarify, the court asked Greenlee whether his understanding was that **Elias**'s remark was "somewhat in jest," to which Greenlee replied that it was and that the juror who related it to him

also perceived it that way: "I think she didn't really feel totally uncomfortable about it."

Although none of the other jurors questioned by the court during the July 2, 1999, hearing recalled hearing Scott recount to them that **Elias** had approached her and asked her what it would take to "win" or "turn" her vote, the court erred on the side of caution and decided to have a more thorough evidentiary hearing, where counsel for both sides could examine the jurors. To accommodate all jurors, that hearing took place on January 3 and January 7, 2000.

During the second hearing, juror Scott testified that she had one chance meeting with **Elias** in the federal court parking lot, during which he had done nothing more than greet her. She did not recall whether she told other jurors about this greeting; she was adamant, however, that **Elias** had said nothing more than words to the effect of "hello" and that she had no recollection of him saying, jokingly or otherwise, anything along the lines of "what do I have to do to win your vote" or "what does a guy have to do to get out of this?" The district court found juror Scott "very credible on this point."

Greenlee also testified at the second hearing. He confirmed his previous testimony that a juror, whom he now remembered was juror Scott, related an incident to him and others in which **Elias** asked her what it would take to win her vote or sway her decision. Greenlee also testified that Scott indicated to him that **Elias** said this "jokingly" and was "not serious" and that he understood the purported comment that way as well. He asserted that after Scott revealed the encounter, "there was really nothing

much said about it after that; that is about the extent of the conversation." The court then asked Greenlee whether what Scott told him about her contact with **Elias** distracted him or made it difficult for him to concentrate on the evidence as he was listening to it in the courtroom. Greenlee replied, "No, it did not."

Burkhart was the only other juror to aver that he had heard reports of Scott's contact with **Elias**. Like Greenlee, however, Burkhart testified that he understood that **Elias** made the remark to Scott in a joking or jovial manner and that the jurors did not discuss the incident after Scott related it. Burkhart also testified that **Elias**'s alleged remark did not scare him or distract him from the evidence and that at the time he heard the information from alternate juror Scott, he was able to remain fair and impartial in the case.

After hearing testimony from all jurors, the district court, in an order laying out detailed findings of fact, denied **Elias**'s motion for a new trial based on jury tampering, juror misconduct, or juror bias. Among the court's most important findings were the following: **Elias** said nothing to Scott beyond a brief greeting or acknowledgment; specifically, he did not ask her anything along the lines of "what it would take to win [her] vote;" Scott told her fellow jurors of this greeting; Greenlee "misinterpreted Scott's comments to mean that **Elias** had asked Scott what it would take to 'win' or 'turn' her vote;" Burkhart misinterpreted Scott's comments to mean that **Elias** had asked Scott "what does a guy have to do to get out of this;" and finally, that both Greenlee and Burkhart interpreted Scott's comments to mean that **Elias** had made his comments to her in a joking manner. The court

concluded that no juror believed **Elias** had tampered with the jury and that **Elias** had not shown any jurors were biased against him.

Elias argues that under Federal Rule of Evidence 606(b), it was improper for the judge to inquire into the juror's perceptions of the incident. However, in the context of a hearing about possible juror tampering, we have rejected the argument that "juror testimony about the effect of extraneous information or improper contacts on a juror's state of mind is prohibited."[67] We distinguished

> between testimony regarding the affected juror's mental processes in reaching the verdict – which is barred by Rule 606(b)-and testimony regarding a juror's more general fear and anxiety following a tampering incident, which is admissible for the purposes of determining whether there is a "reasonable possibility that the extraneous contact affected the verdict."[68]

Under this rationale, it was proper for the district court to question the jurors regarding their thoughts about the alleged tampering by **Elias**. While the judge ultimately found that there was in fact no tampering incident, this does not affect our decision to apply *Henley* because, at the time of the hearings, the allegation of tampering was both specific and serious. Thus, we hold that the evidentiary hearings did not result in impermissible inquiry into the jury's deliberative processes in violation of Federal Rule of Evidence 606(b).

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[67] *United States v. Henley*, 238 F.3d 1111, 1117 (9th Cir. 2001)

[68] *Id.* at 1118, *quoting United States v. Cheek*, 94 F.3d 136, 144 (4th Cir. 1996).

"Because the district court held extensive evidentiary hearings and made findings of fact, we review the findings of fact to determine whether they are 'clearly erroneous.' "[69] There is no evidence that they are. By far, the most difficult thing to understand is how, if Scott merely said that **Elias** had greeted her, two people came to believe he had suggested a bribe, jokingly or otherwise. There is no satisfactory explanation. The fact remains, however, that both jurors testified that whatever they thought **Elias** had said, he had said jokingly. They testified that it did not preoccupy them at the time, frighten them, or distract them from focusing on the evidence. In light of this, the district court's conclusion that **Elias** had not borne his burden[70] of showing juror bias appears correct. Accordingly, we affirm the district court's denial of **Elias**'s motion for a new trial.

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[69] *Sea Hawk Seafoods, Inc. v. Alyeska Pipeline Serv. Co.*, 206 F.3d 900, 911 (9th Cir. 2000).

[70] *See United States v. Hanley*, 190 F.3d 1017, 1030 (9th Cir. 1999) ("A defendant bears the burden of showing that a juror was actually biased against him or her and that the district court abused its discretion or committed manifest error when it failed to excuse the juror for cause.") (internal quotation marks and alteration omitted). *See also Dyer v. Calderon*, 151 F.3d 970, 975 (9th Cir. 1998) (en banc) (reviewing state court's ruling on juror bias, en banc court stated that "[s]o long as the fact-finding process is objective and reasonably explores the issues presented, the state trial judge's findings based on that investigation are entitled to a presumption of correctness.")

F. *Restitution Order*

The district court ordered **Elias** to pay $6.3 million in restitution to Dominguez. **Elias** argues that this constitutes plain error[71] because 18 U.S.C. § 3663[72] only authorizes imposition of restitution for violations of Title 18 and certain other provisions not applicable here, whereas his crimes were violations of Title 42. Because **Elias** is correct, we vacate the sentence in that respect and remand for entry of an amended judgment.

The jury convicted **Elias** of four counts. The first of these listed only 42 U.S.C. § 6928(e) as the relevant statute, so it cannot possibly support the imposition of restitution. By contrast, Counts II and III listed violations of both 18 U.S.C. § 2 and 42 U.S.C. § 6928(d)(2)(a). The reference to 18 U.S.C. § 2 likely explains why the district court thought imposing restitution was proper. In *United States v. Snider*,[73] however, this court held that "[t]he mention of [18 U.S.C. § 2] does not bring the restitution order within the ambit of [18 U.S.C. § 3663]" because "Section 2 does not establish 'an offense' of which a

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[71] **Elias** failed to raise this issue before the trial court.

[72] This section provides in relevant part:

> The court, when sentencing a defendant convicted of an offense under this title, section 401, 408(a), 409, 416, 420, or 422(a) of the Controlled Substances Act . . . or section 46312, 46502, or 46504 of title 49 . . . may order . . . that the defendant make restitution to any victim of such offense. . . .

[73] 957 F.2d 703 (9th Cir. 1992).

defendant may be convicted; it merely determines which offenders may be punished as principals."[74]

The Government asserts that even if the restitution order cannot be upheld on the basis of Counts II and III, it may be upheld on the basis of Count IV, the material misstatement count that alleged a violation of 18 U.S.C. § 1001. Although, as a theoretical matter, § 1001 offenses may support the imposition of restitution,[75] **Elias**'s § 1001 offense cannot support the court's order of restitution for Dominguez because Dominguez was not a victim of that particular crime.[76] **Elias** did not harm Dominguez by lying; he harmed him by knowingly exposing him to hazardous waste. This latter offense is one of the few for which Congress has not sanctioned the imposition of restitution. Perhaps this case will change that. At present, however, we conclude that the law does not sanction the imposition of restitution in this instance.

III.

CONCLUSION

For the reasons stated above, we AFFIRM in part, VACATE in part, and REMAND the case to the district court with instructions to amend the sentence by deleting the restitution provision. The district court may consider further amending the sentence by imposing a term of

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[74] *Id.* at 706.

[75] *See, e.g., United States v. Hoover*, 175 F.3d 564, 569 (7th Cir. 1999).

[76] *See United States v. Rodrigues*, 229 F.3d 842, 845 (9th Cir. 2000).

supervised release with a condition requiring restitution, pursuant to U.S. Sentencing Guidelines § 5E1.1(a)(2) (1995). In fulfilling the mandate of this remand, the court may hold such hearings and enter such orders as it deems appropriate. In all other respects, the judgment and sentence shall remain as written.

AFFIRMED in part, VACATED in part, and REMANDED.

APPENDIX

42 U.S.C. § 6928. Federal enforcement

(a) Compliance orders.

(1) Except as provided in paragraph (2), whenever on the basis of any information the Administrator determines that any person has violated or is in violation of any requirement of this subchapter, the Administrator may issue an order assessing a civil penalty for any past or current violation, requiring compliance immediately or within a specified time period, or both, or the Administrator may commence a civil action in the United States district court in the district in which the violation occurred for appropriate relief, including a temporary or permanent injunction.

. . . .

(d) Criminal penalties. Any person who . . .

. . . .

(2) knowingly treats, stores, or disposes of any hazardous waste identified or listed under this subchapter . . .

(A) without a permit under this subtitle . . .

(3) knowingly omits material information or makes any false material statement or representation in any application, label, manifest, record, report, permit, or other document filed, maintained, or used for purposes of compliance with regulations promulgated by the Administrator (or by a State in the case of an authorized State program) under this subchapter;

(4) knowingly generates, stores, treats, transports, disposes of, exports, or otherwise handles any hazardous waste or any used oil not identified or listed as a hazardous waste under this subchapter . . . and who knowingly destroys, alters, conceals, or fails to file any record, application, manifest, report, or other document required to be maintained or filed for purposes of compliance with regulations promulgated by the Administrator (or by a State in the case of an authorized State program) under this subchapter;

(5) knowingly transports without a manifest, or causes to be transported without a manifest, any hazardous waste or any used oil not identified or listed as a hazardous waste under this subchapter required by regulations promulgated under this subchapter (or by a State in the case of a State program authorized under this subchapter) to be accompanied by a manifest . . .

. . . .

shall, upon conviction, be subject to a fine of not more than $50,000 for each day of violation, or imprisonment not to exceed two years (five years in the case of a violation of paragraph (1) or (2)), or both. If the conviction is for a violation committed after a first conviction of such person under this paragraph, the maximum

punishment under the respective paragraph shall be doubled with respect to both fine and imprisonment.

(e) Knowing endangerment.

Any person who knowingly transports, treats, stores, disposes of, or exports any hazardous waste identified or listed under this subchapter or used oil not identified or listed as a hazardous waste under this subchapter in violation of paragraph (1), (2), (3), (4), (5), (6), or (7) of subsection (d) of this section who knows at that time that he thereby places another person in imminent danger of death or serious bodily injury, shall, upon conviction, be subject to a fine of not more than $250,000 or imprisonment for not more than fifteen years, or both.[77]

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[77] 42 U.S.C. § 6928.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ALLEN ELIAS, Defendant-Appellant.	No. 00-30145 D.C. No. CR-98-00070-BLW MEMORANDUM* (Filed Oct. 23, 2001)

Appeal from the United States District Court
for the District of Idaho
B. Lynn Winmill, Chief District Judge, Presiding.

Argued and Submitted June 5, 2001
Seattle, Washington

Before: WALLACE, HALL, and T.G. NELSON, Circuit Judges.

Because the facts of this case are recounted in the opinion filed contemporaneously, we do not repeat them here.

I. KNOWING ENDANGERMENT

The evidence at trial showed the following: Elias put cyanide in the tank sometime in the 1980s; he knew that

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

one to two tons of sludge remained in the tank when he transported it years later; OSHA had informed Elias that his failure to have a cyanide antidote kit, his failure to continuously monitor for cyanide with appropriate equipment, his violations of closed entry permits, and his failure to properly train and equip his employees caused a "substantial probability of death or serious physical harm" on other occasions; nonetheless, Elias failed to provide any training or the safety equipment he knew he should provide; after Dominguez collapsed, Elias denied any knowledge that cyanide might be in the tank; after Dominguez's injury, Elias persisted in endangering employees by having them acknowledge training that they never undertook and by instructing another man to bury the sludge that harmed Dominguez without the benefit of safety equipment. Viewing this evidence in the light most favorable to the prosecution, a rational trier of fact could have found beyond a reasonable doubt that Elias knowingly exposed his employees to hazardous waste that he knew with substantial certainty would cause death or serious bodily injury.[1]

II. THEORY OF DEFENSE INSTRUCTIONS

The district court did not err in refusing to give Elias's proposed instruction regarding assumption of risk because no evidence supported it. One cannot logically infer from the fact that at least two coworkers knew or suspected that the tank was dangerous that Dominguez

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[1] *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (explaining standard of review).

knew that there was potentially deadly cyanide in the tank and that he nonetheless consented to entering it, particularly in view of his direct testimony to the contrary.

The empty container instruction was similarly unwarranted. A "container" is "any portable device in which a material is stored, transported, treated, disposed of, or otherwise handled."[2] In contrast, a "tank" is "a stationary device, designed to contain an accumulation of hazardous wastes which is constructed primarily of nonearthen materials . . . which provide structural support."[3] The district court sensibly concluded that the fact that this 36 x 11 ft, 25,000-gallon tank had been moved did not necessarily mean the tank was portable and thus a "container." Contrary to Elias's assertion, the EPA's OSWER Directive 9441.19185 supports the district court's decision rather than undermines it. The OSWER directive only concluded that the "tanks" at issue there were "containers" because those tanks were tank *cars*.[4] Moreover, even if Elias's tank could be characterized as a "container," the instruction he sought would not have been warranted because there was no evidence that it was "empty" within the meaning of 40 C.F.R. § 261.7(b).

Finally, the district court did not err in failing to instruct the jury that 40 C.F.R. § 261.4(b)(7) exempts from RCRA regulations waste resulting from extraction and

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[2] 40 C.F.R. § 260.10.

[3] *Id.*

[4] OSWER Directive 9441.1985(41), Dec. 12, 1985, 1985 WL 286839 (OSWER).

beneficiation of ores and minerals. By its terms, that exemption only applies to primary mineral production where the feedstock contains less than 50 percent scrap materials.[5] It does not apply to secondary production of mineral commodities like recovery from flue dust, which is what AEI did.

III. PRIOR BAD ACTS EVIDENCE[6]

Contrary to Elias's contention, the OSHA inspector's testimony, as well as the testimony from several of Elias's employees, is relevant to offense elements. It tends to show that Elias had long ago been put on specific notice of the risks associated with confined spaces and the handling of cyanide. This, in turn, provides circumstantial evidence that Elias knew the tank was in fact dangerous. The evidence, in other words, was admissible to show intent, knowledge, or absence of mistake or accident.[7]

IV. STATEMENTS BY THE EPA ENGINEER

During Elias's direct examination of EPA engineer Michael Silverman, the Government objected based on hearsay and lack of personal knowledge. The gist of the

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[5] 40 C.F.R. § 261.4(b)(7)(iii)(A).

[6] Review of Elias's claim that evidence of prior bad acts was improperly admitted is complicated by the fact that, rather than drawing this court's attention to specific statements, Elias simply directs us to 171 pages in the transcript containing testimony from several different witnesses.

[7] Fed. R. Evid. 404(b).

objection was that Silverman was simply repeating what Elias had told him during an inspection. The court sustained the objection:

> I'm not going to preclude any inquiry of the witness, but Rule 602 requires that as a condition to any witness' testimony, that a foundation be established of personal knowledge and unless such questions are phrased that way, I will sustain the objection as violative of Rule 602 and if the basis of knowledge relies upon hearsay, I will sustain the objection pursuant to Rule 801, 802. So, with that limitation, I'm not going to exclude the witness from testifying, but it needs to be clear that this was based upon observation and not based upon hearsay.

To this Elias's counsel replied, "I understand, Your Honor." Counsel did not object to the exclusion of the evidence and did not advance the argument that the information sought was not hearsay or was otherwise admissible. Under these circumstances, the Government is correct that this court reviews for plain error.[8]

There is no such error here. Counsel gave no indication at the time that the exclusion of the testimony would "seriously affect the fairness, integrity or public reputation of judicial proceedings, or . . . would amount to a miscarriage of justice."[9] Given the ample evidence that

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[8] *See United States v. Sarno*, 73 F.3d 1470, 1490 (9th Cir. 1995) (reviewing for plain error where defendant failed to object when court sustained an objection and struck testimony as irrelevant).

[9] *United States v. Necoechea*, 986 F.2d 1273, 1276 (9th Cir. 1993) (internal quotation marks and alteration omitted).

Elias knew that there was dangerous cyanide sludge in the tank, any error was not plain.

V. EVIDENCE OF MATERIAL MISSTATEMENT

Viewing the evidence in the light most favorable to the prosecution, there is evidence from which a rational trier of fact could have found that Elias made a material misstatement to OSHA investigators by representing that he completed a confined space entry permit on August 27, 1996, when he did not in fact complete it until after that date.[10] The permit Elias signed states that it was "issued" on August 27, 1996, at 10:30 a.m. After Dominguez was injured, Elias told investigators that he had completed a permit that day, though he described it as "handwritten" and "not very formalized." Elias declined, however, to actually provide the permit to investigators on that day, or even on the next day. Most damaging, however, was a Kerr-McGee Corporation manager's testimony that early on the morning of August 28, Elias visited him, inquired about the requirements for confined space entries, and departed with Kerr-McGee's safety manual, which spelled out the requirements for a confined space entry permit. Although this evidence is certainly not overwhelming, it is legally sufficient.

VI. SENTENCE

Under U.S.S.G. § 3D1.1, offense levels for multiple counts are consolidated into a single "combined offense

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[10] *Jackson*, 443 U.S. at 319.

level." In this case, that level was 36, yielding a sentencing range of 188-235 months. In turn, U.S.S.G. § 5G1.2, which governs "Sentencing on Multiple Counts of Conviction," provides that where, as here,

> the sentence imposed on the count carrying the highest statutory maximum is less than the total punishment [the combined offense level dictates], then the sentence imposed on one or more of the other counts shall run consecutively, but only to the extent necessary to produce a combined sentence equal to the total punishment. In all other respects, sentences on all counts shall run concurrently. . . . [11]

The district court followed this guideline. Because the statutory maximum for each of the individual counts of conviction was less than the combined sentence, it imposed the statutory maximum, with the concurrent/consecutive nature of those sentences determined according to U.S.S.G. § 5G1.2(d). That Elias's material misstatement conviction, standing alone, would only have warranted a 12-18 month sentence is immaterial. Elias simply overlooks the fact that when offenses are grouped into a combined offense level, it is that level – and not the individual offense levels – that dictates his ultimate sentence.[12]

AFFIRMED in part, VACATED in part, and REMANDED.

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[11] U.S.S.G. 5G1.2(d).

[12] *See* USSG §§ 3D1.1 and 3D1.4.

UNITED STATES DISTRICT COURT

District of Idaho

UNITED STATES OF AMERICA

V.

Allan Elias

JUDGMENT IN A CRIMINAL CASE

(For Offenses Committed On or After November 1, 1987)

(Filed May 5, 2000)

Case Number: 4:98CR00070-001

Craig Jorgensen
Defendant's Attorney

THE DEFENDANT:

[ ] pleaded guilty to count(s) _____

[ ] pleaded nolo contendere to count(s) _____ which was accepted by the court.

X was found guilty on count(s) 1, 2, 3, and 4 after a plea of not guilty.

Title & Section	Nature of Offense	Date Concluded	Count Number(s)
42 U.S.C. Section 6928(e)	Knowing Endangerment	08/27/1996	1
18 U.S.C. Section 2 & 42 U.S.C. Section 6928 (d)(2)(A)	Disposal of Hazardous Waste without a Permit	09/30/1996	2 and 3

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s) _____

X Count(s) 5 X is [ ] are dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec.
114-28-0755

Defendant's DOB
01/16/1938

Defendant's USM No.:
94520-023

Defendant's Residence Address:
680 E 3rd N
Soda Springs, ID 83276

Defendant's Mailing Address:
Same as Above

04/28/2000
Date of Imposition of Judgment

/s/ B. Lynn Winmill
Signature of Judicial Officer

B. Lynn Winmill, United States District Judge
Name and Title of Judicial Officer

5/5/00
Date

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 U.S.C. Section 1001	False Statements	09/30/1996	4

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total total term of 204 months, consisting of a term of 180 months on count 1; a term of 24 months on each of counts 2 and 3 to be served consecutive to count 1, but concurrent to each other; and a term of 60 months on count 4 of which 36 months are to be served concurrent to count 1 and 24 months to be served consecutive to Count 1 and concurrent to counts 2 and 3.

X The court makes the following recommendations to the Bureau of Prisons: that the defendant be placed in a facility in the State of California, close to his family.

X The defendant is remanded to the custody of the United States Marshal.

[ ] The defendant shall surrender to the United States Marshal for this district:

[ ] at _____ [ ] a.m. [ ] p.m. on _____

[ ] as notified by the United States Marshal.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

[ ] before 2 p.m. on _____.

[ ] as notified by the United States Marshal.

[ ] as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 years, consisting of 3 years on each count to be served concurrently.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

X The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

X The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law

enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

1) Defendant shall comply with the rules and regulations of the Probation Department.

2) Defendant shall pay any special assessment and restitution that is imposed by this judgement and that remains unpaid at the commencement of supervised release as a condition of supervision. Payments to be on a monthly payment scheduled to be established and may be periodically modified by the probation officer, provided the entire financial penalty is paid no later than the termination of term of supervised release. Payments to be made to Clerk of the Court, District of Idaho, 550 W. Fort St., MSC 039, Boise, ID 83724. Clerk shall disburse restitution payments to the victim(s).

3) Defendant shall provide the probation officer with access to any requested financial information. Defendant shall not incur new credit charges or open additional lines of credit without the approval of the probation officer unless the defendant is in compliance with the installment payment schedule.

4) Defendant shall not possess a firearm or other dangerous weapon.

5) Defendant shall submit to a search of his person, place of residence, or automobile at the direction of the U.S. Probation Officer and submit to seizure of any contraband found therein.

Special conditions of supervised release shall supersede any standard condition that is inconsistent with the special conditions.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
Totals:	$ 400.00	$	$ 6,300,836.00

[ ] If applicable, restitution amount ordered pursuant to plea agreement..... $ _____

FINE

The above fine includes costs of incarceration and/or supervision in the amount of $ _____

The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the options on Sheet 5, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

[ ] The court determined that the defendant does not have the ability to pay interest and it is ordered that:

[ ] The interest requirement is waived.

[ ] The interest requirement is modified as follows:

RESTITUTION

~~[ ]~~ The determination of restitution is deferred until _____. An Amended Judgment in a Criminal Case will be entered after such a determination.

X The defendant shall make restitution to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below.

Name of Payee	*Total Amount of	Amount of Restitution Ordered	Priority Order or Percentage of Payment
Scott Dominguez	$5,936,036.00	$5,936,036.00	
Evergreen Site Clean Up	$364,750.00	$364,750.00	
Totals:	$ 6,300,836.00	$ 6,300,836.00	

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994 but before April 23, 1996.

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A X in full immediately; or

B [ ] $ _____ immediately, balance due (in accordance with C, D, or E); or

C [ ] not later than _____; or

D [ ] in installments to commence ____ day(s) after the date of this judgment. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due, and shall request the court to establish a payment schedule if appropriate; or

E [ ] in _____ (*e.g. equal, weekly, monthly, quarterly*) installments of $ _____ over a period of ____ year(s) to commence ____ day(s) after the date of this judgment.

The defendant will be credited for all payments previously made toward any criminal monetary penalties imposed.

Special instructions regarding the payment of criminal monetary penalties:

$400 special assessment and $6,300,836.00 restitution consisting of $5,936,036.00 to the accident victim and $364,750.00, is due immediately. Payments to be made to

Clerk of the Court, District of Idaho, 550 W. Fort St., MSC 039, Boise, ID 83724. Clerk shall disburse restitution payments to the victims. Interest on restitution is NOT waived.

[ ] The defendant shall pay the cost of prosecution.

[ ] The defendant shall forfeit the defendant's interest in the following property to the United States:

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program, are to be made as directed by the court, the probation officer, or the United States attorney.

STATEMENT OF REASONS

[ ] The court adopts the factual findings and guideline application in the presentence report.

OR

X The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary): Court did not apply the "Role in the Offense" Guideline at section 3B1.1(a) and removed 4 points from the guideline calculation.

Guideline Range Determined by the Court:

Total Offense Level: 36

Criminal History Category: I

Imprisonment Range: 188 to 235 months

Supervised Release Range: 2 to 3 years

Fine Range: $ 20,000 to $ 200,000

X Fine waived or below the guideline range due to substantial restitution.

Total Amount of Restitution: $ 6,300,836.00

[ ] Restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims, pursuant to 18 U.S.C. § 3663(d).

[ ] For offenses committed on or after September 13, 1994 but before April 23, 1996 that require the total amount of loss to be stated, pursuant to Chapters 109A, 110, 110A, and 113A of Title 18, restitution is not ordered because the economic circumstances of the defendant do not allow for the payment of any amount of a restitution order, and do not allow for the payment of any or some portion of a restitution order in the forseeable future under any reasonable schedule of payments.

[ ] Partial restitution is ordered for the following reason(s):

[ ] The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

[ ] The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

[X] The sentence departs from the guideline range:

[ ] upon motion of the government, as a result of defendant's substantial assistance.

[X] for the following specific reason(s):
Court departs upward from the total offense level by 2 points pursuant to section 2Q1.2 application note 6 to result in a total offense level of 36.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

UNITED STATES OF AMERICA, Plaintiff,	)	Cr. No. 98-0070-E-BLW
v.	)	MEMORANDUM DECISION AND ORDER
ALLAN ELIAS, Defendant.	)	

INTRODUCTION

The defendant was convicted of four counts alleging hazardous waste violations. He filed a motion to dismiss three of those counts on the ground that the Court had no jurisdiction over them. More specifically, he claims that the federal laws contained in counts one, two, and three were supplanted by the State of Idaho's hazardous waste laws when those laws were approved by the Environmental Protection Agency. The Court agrees with respect to counts two and three, but disagrees as to count one. The Court will therefore grant in part the motion to dismiss, and will order that counts two and three be dismissed and that the convictions on those counts be set aside. The Court will deny the motion as to count one. Thus, the defendant remains convicted of counts one and four. The Court will set a date for sentencing in the separate Judgment. The Court's analysis is set forth below.

ANALYSIS

Defendant Elias was convicted on four counts of making false statements to the Government, improperly handling hazardous waste, and endangering his employees by exposing them to that waste. In his motion to dismiss, Elias claims that the Court did not have jurisdiction over three of those counts. Elias claims that state law supplanted analogous federal law, leaving the Government without authority to charge Elias with the federal offenses contained in the first three counts of the indictment.

The first three counts of the indictment alleged violations of the Resource Conservation and Recovery Act (RCRA). That Act creates a federal program governing management of hazardous waste. RCRA contains a provision allowing the Environmental Protection Agency (EPA) to authorize a state to administer and enforce a hazardous waste program. *See* 42 U.S.C. § 6926(b). To receive such authorization, the state's hazardous waste program must be substantially equivalent to the federal law. In this case, the EPA approved Idaho's hazardous waste program in 1995, just over a year before the incidents in this case occurred. *See* 40 C.F.R. § 272.650.

Having obtained EPA approval, Idaho was authorized to operate its program "in lieu of the Federal program under this Subchapter in such State and to issue and enforce permits for the storage, treatment, or disposal of hazardous waste." 42 U.S.C. § 6926(b). Elias asserts that the "in lieu of" language means that the Idaho hazardous waste laws supplant the analogous federal laws, leaving the EPA without authority to enforce

the supplanted federal laws. The Government responds that even after approving Idaho's hazardous waste program, the EPA retains the authority to enforce RCRA in Idaho. To resolve this dispute, the Court must examine the relationship between the EPA and the states in enforcing hazardous waste laws.

The plain meaning of the phrase "in lieu of" as used in § 6926(b) is that approved state hazardous waste laws supplant their RCRA counterparts. That is precisely how the EPA itself interpreted § 6926(b) in its Enforcement Memorandum: "When EPA authorizes a [state] hazardous waste management program . . . the state program becomes the RCRA program in that state. . . . In other words, the only hazardous waste program in effect in that state is the state program. . . . " *See EPA Enforcement Memorandum (attached as exhibit 1 to Brief of Elias)* at 15-8.[1] The Supreme Court appears to agree, having noted that RCRA's provisions are "subject to *displacement* by an adequate state counterpart." *Department of Energy v. Ohio*, 503 U.S. 607, 611 (1992) (emphasis added).

While the state program becomes the RCRA program once approved by the EPA, the EPA is not barred from all enforcement activity. The provisions of § 6928(a)(2) state that

> in the case of a violation of any requirement of this subchapter where such violation occurs in a

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[1] The EPA's Enforcement Memorandum was authored by the EPA's Enforcement Counsel in 1982. The Government makes no contention that the Memorandum does not accurately reflect the EPA's views or should be excluded from consideration. The Court will therefore consider the Memorandum.

> State which is authorized to carry out a hazardous waste program . . . the [EPA] shall give notice to the State in which such violation has occurred prior to issuing an order or commencing a civil action under this section.

This provision clearly contemplates that the EPA will have a continuing enforcement role even after it has approved a state program. This interpretation is confirmed by the legislative history behind § 6928(a)(2):

> This legislation permits the states to take the lead in the enforcement of the hazardous waste laws. However, there is enough flexibility in the act to permit the [EPA], in situations where a state is not implementing a hazardous waste program, to actually implement and enforce the hazardous waste program against violators in a state that does not meet the federal minimum requirements. Although the *[EPA] is required to give notice of* violations of this title to the states with authorized hazardous waste programs, the [EPA] is not prohibited from acting in those cases where the states fail to act, or from withdrawing approval of the state hazardous waste plan and implementing the federal hazardous waste program pursuant to Title III of this act.

1976 U.S.C.C.A.N. 6269.

A similar description of the EPA/state relationship is contained in the EPA regulations approving Idaho's hazardous waste program: "Idaho has primary responsibility for enforcing its hazardous waste program. However, EPA retains the authority to exercise its enforcement authorities under sections [6927, 6928, 6934, and 6973] of RCRA. . . . " *See* 40 C.F.R. § 272.650(c) (1999). The Ninth Circuit, in *Washington v. United States EPA*, 752 F.2d 1465,

1467 (9th Cir. 1985), interpreted the law similarly: "Where a state program is in effect, EPA retains certain oversight and enforcement powers, including the power to withdraw authorization if the state program fails to comply with the federal requirements." Thus, by approving a state's program, the EPA does not lose the authority to enforce hazardous waste laws.

But what laws does the EPA enforce – the RCRA or the state's laws? According to the EPA's Enforcement Memorandum, it would be enforcing state laws: "[T]he only hazardous waste program in effect in that state [with an EPA-approved program] is the state program, and the state laws and regulations are those which must be enforced by EPA should federal enforcement action be necessary." *EPA Enforcement Memorandum, supra,* at 15-8.[2] The EPA also took this position in *Harmon Industries, Inc. v. Browner,* 191 F.3d 894, 899 (8th Cir. 1999) where it argued that RCRA "authorizes either the state or the EPA to enforce the state's regulations. . . .

That interpretation is confirmed by §§ 6928(3), (4), and (5). Those provisions all authorize EPA enforcement based on the failure of any person to comply with "regulations promulgated by the Administrator (or by a State in the case of an authorized State program) under this subchapter." These provisions clearly contemplate the

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[2] Later in the Memorandum, the EPA reaffirms that interpretation: "The federal program [in a state with an EPA-approved program] ceases to exist in that state, except for the potential of federal enforcement of the state program. . . . " *Id.* at 1513.

EPA enforcing state laws, not their analogous counterparts in RCRA, in those states having EPA-approved programs.

Any other interpretation would ignore the "in lieu of" language in § 6926(b). If the EPA could enforce RCRA provisions that had analogous state law counterparts in an EPA-approved program, the "in lieu of" language would essentially be stricken from § 6926(b). Such a reading would violate the canon of statutory construction that every part of the statute be given meaning. *See U.S. v. Garcia*, 112 F.3d 395, 398 (9th Cir. 1997) (rejecting interpretation of statute in criminal case that would ignore a phrase contained in the statute).

The EPA asserts, however, that the Ninth Circuit held in *Wyckoff Co. v. EPA*, 796 F.2d 1197 (9th Cir. 1986), that the EPA retains the right to pursue enforcement of even those RCRA provisions that have analogous state law EPA-approved provisions. The Court disagrees, because that issue was never raised or addressed in *Wyckoff*.

The dispute in *Wyckoff* began when the EPA found hazardous wastes leaking into the soil from two wood treatment plants located in the state of Washington and owned by Wyckoff. The EPA, under the authority of RCRA's § 6934, ordered Wyckoff to submit written proposals for monitoring the sites. Section 6934 states that whenever the EPA finds that hazardous wastes "may present a substantial hazard to human health or the environment," the EPA may order the owner of a facility to conduct monitoring to ascertain the "nature and extent of the hazard."

Wyckoff refused to conduct the monitoring on the ground that Washington had an EPA approved program, divesting the EPA of all authority whatsoever to enforce any provision of RCRA. The Ninth Circuit disagreed, holding that even in a state with an EPA-approved program, the EPA "retains certain oversight and enforcement powers" and that § 6934 is "one of the sections which the EPA retained its powers of oversight and enforcement." *Id.* at 1201 (quoting from *Washington*, 752 F.2d at 1467).

There was no discussion in *Wyckoff* as to whether Washington's EPA-approved program had a counterpart to RCRA's § 6934. If there was an analogous provision, Wyckoff never raised the argument, as Elias has here, that the EPA would be limited to enforcing only the EPA-approved state law provision. Thus, *Wyckoff* understandably never addressed the issue whether the EPA has the authority to enforce a RCRA provision that has a state law counterpart under an EPA-approved state program.[3]

As the Court discussed above, the "in lieu of" language must be given some meaning. The most reasonable

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[3] While *Wyckoff* never addressed the issue, RCRA § 6934 does have a counterpart in Washington law. Section § 70.105D.030 of the Washington Code permits State authorities to "require potentially liable persons to investigate any releases . . . including but not limited to inspecting, sampling, or testing to determine the nature or extent of any release or threatened release." However, that provision was not passed until 1988, about two years after *Wyckoff*. It is unclear whether there was a similar provision in Washington law at the time the EPA approved Washington's program just prior to the *Wyckoff* decision. All this speculation really leads nowhere, because it cannot alter the fact that *Wyckoff* never discussed this issue.

interpretation of that phrase is that it substitutes an EPA-approved state program for that program's RCRA counterparts. As the EPA's own Enforcement Memorandum concludes, the EPA then enforces the approved state laws, not the RCRA counterparts.

Wyckoff says nothing to the contrary. *Wyckoff* does allow the EPA to enforce RCRA statutes in a state with an approved program. But *Wyckoff* never addresses whether it would have reached the same result if the RCRA statute at issue had a counterpart in Washington's approved program. In fact, *Wyckoff* could not have done so and remained true to settled principles of statutory construction. To allow the EPA to enforce RCRA provisions that have counterparts in approved state programs is to ignore the phrase "in lieu of" in § 6926(b). Such an interpretation would make EPA approval a meaningless act.

Thus, the Court refuses to extend *Wyckoff* into an area that the decision itself never addressed. That is, the Court refuses to interpret *Wyckoff* as permitting the EPA to enforce even those RCRA statutes that have counterparts in the approved state program. Instead, the Court will interpret *Wyckoff* as permitting the EPA to enforce those provisions of RCRA that have no counterpart in the approved state program.

To summarize, the Court finds as follows: (1) EPA-approved state hazardous waste laws supplant their RCRA counterparts; (2) The EPA retains authority to enforce those approved state laws; (3) When the EPA approves a state program, the EPA loses the authority to enforce those RCRA provisions with counterparts in the

approved state program; (4) When the EPA approves a state program, the EPA retains the authority to enforce RCRA provisions that have no counterparts in the approved state program.

The Court will now apply these general findings to the case at hand. Elias challenges counts one, two, and three of the indictment. All three counts allege violations of RCRA, not Idaho law. The issue is whether the RCRA provisions in counts one, two, and three, of the indictment were supplanted by Idaho's own hazardous waste laws, leaving the Government without authority to pursue the RCRA claims.

Count one charged Elias with a violation of § 6728(e) for knowingly endangering his employees by exposing them to hazardous waste. There is no counterpart to this statute in the Idaho program. Count two of the indictment charges Elias with disposing of hazardous waste without a permit on August 26 and 27, 1996, in violation of § 6928(d)(2)(A). Count three contains a similar charge that he disposed of hazardous waste without a permit in September, 1996. These two charges under § 6928(d)(2)(A) have a direct counterpart in the Idaho program – Idaho Code § 39-4408(l), that similarly forbids disposing of hazardous waste without a permit. The enforcement and criminal penalty provisions of the Idaho Code, §§ 39-4413 to 4415, are also part of the authorized Idaho program and counterparts to the RCRA enforcement and penalty provisions.[4]

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[4] The Government argues in its briefing that Idaho Code §§ 39-4413 to 4415 are not part of the authorized Idaho program.

Thus, there is an Idaho counterpart for the RCRA violation alleged in counts two and three, but none for count one. In accordance with the four findings summarized above, the EPA retained the authority to indict Elias for the crime charged in count one – knowing endangerment – because there was no counterpart to that charge under Idaho's approved program. The Court will therefore deny Elias's motion to dismiss count one. With regard to counts two and three, however, the EPA retained only the authority to indict Elias under the applicable state law, not its RCRA counterpart.

That state law is not cited anywhere in counts two or three, or elsewhere in the indictment. An essential purpose of the indictment is to give a defendant notice of the charge so that he may defend or plead his case adequately. *James*, 980 F.2d at 1316. Generally, the failure of an indictment to detail each element of the charged

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The EPA regulations adopting Idaho's program state that these statutory provisions "although not incorporated by reference, are part of the authorized State program." *See* 40 C.F.R. § 272.651(b)(2). The Government apparently is relying on the "not incorporated by reference" language. The regulation explaining the "incorporation by reference" language says nothing that would support the Government's reading. *See* 40 C.F.R. § 272.2. In fact, the principal regulation dealing with the EPA's approval process states simply that the EPA "shall make a final determination whether or not to approve the state's program." *See* 40 C.F.R. § 271.20(e). That regulation does not state that "incorporation by reference" plays any part in the approval process. Here, the EPA has stated that Idaho Code §§ 39-4413 to 4415 are part of the EPA-authorized program. The Government has offered no credible support for its contention that these statutes were in fact not approved. The Court will therefore assume that these Idaho statutes are EPA-approved.

offense constitutes a fatal defect. *Id.* at 1316. "A claim of a defective indictment can be raised at any time, but challenges should be made at the earliest possible moment. Indictments which are tardily challenged are liberally construed in favor of validity." *United States v. James*, 980 F.2d 1314, 1316 (9th Cir. 1992) (internal punctuation and citations omitted). The court should not reverse the conviction in the absence of prejudice to the defendant. *See United States v. Normandeau*, 800 F.2d 953, 958 (9th Cir. 1986).

The Government asserts that Elias was not prejudiced because the law under the Idaho statutes is the same as RCRA. However, Elias points to evidence, in the form of letters from Idaho's Department of Environmental Quality, the agency administering Idaho's hazardous waste laws, stating that mining waste is not covered by the Idaho hazardous waste law. Elias was charged with illegally disposing of cyanide-bearing waste, which he produced in "the course of attempting to extract silver from mining waste" according to the indictment. The mining waste defense would have been completely irrelevant under the RCRA charges, but may be relevant if Elias was charged under the Idaho law.

If Elias must show prejudice, he has done so. However, it would appear to the Court that the failure of the indictment to cite the applicable statute is prejudice enough. Either way, counts two and three of the indictment are insufficient, and must be dismissed.

ORDER

In accordance with the Memorandum Decision set forth above,

NOW THEREFORE IT IS HEREBY ORDERED, that the motion to dismiss (docket no. 208) is hereby GRANTED IN PART AND DENIED IN PART. It is granted to the extent that it seeks to dismiss counts two and three from the indictment and to set aside the convictions on counts two and three. It is denied in all other respects. Specifically, the defendant remains convicted on counts one and four of the indictment.

IT IS FURTHER ORDERED, that sentencing shall be held on April 28, 2000, at 9:00 a.m. in the Federal Courthouse in Pocatello, Idaho.

Dated this 16th day of March, 2000.

/s/ B. Lynn Winmill
B. LYNN WINMILL
CHIEF JUDGE, UNITED
STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

UNITED STATES OF AMERICA, Plaintiff, v. ALLAN ELIAS, Defendant.	Cr. No. 98-0070-E-BLW MEMORANDUM DECISION AND ORDER (Filed Apr. 26, 2000)

INTRODUCTION

The Court has before it the Government's motion seeking reconsideration of the Court's decision dismissing counts two and three of the indictment and setting aside the conviction on those counts. The Court also has before it defendant Elias's motion seeking reconsideration of the Court's decision rejecting his attempt to dismiss count one of the indictment, and Elias's motion to dismiss count four. The Court will grant the Government's motion and deny Elias's motions. Accordingly, the Court will reinstate the conviction of Elias on counts two and three. The sentencing on April 28, 2000, will therefore proceed on the basis that Elias was convicted of counts one, two, three, and four, The Court finds further that the appropriate sanctions for the convictions on counts one, two, and three, are set forth in 42 U.S.C. § 6928(d). The Court's analysis is set forth below.

ANALYSIS

The Court will turn first to the Government's motion. In its earlier opinion, the Court made four findings that it summarized as follows:

> (1) EPA-approved state hazardous waste laws supplant their RCRA counterparts; (2) the EPA retains authority to enforce those approved state laws; (3) When the EPA approves a state program, the EPA loses the authority to enforce those RCRA provisions with counterparts in the approved state program; (4) When the EPA approves a state program, the EPA retains the authority to enforce RCRA provisions that have no counterparts in the approved state program.

In its motion to reconsider, the Government has largely conceded these points. The Government states in its briefing that "any federal or state enforcement action for hazardous waste violations must be based on the requirements of state law, including the state's definition of hazardous waste. . . . " *See Government's Motion for Reconsideration* at 13. The Government then asserts that while Idaho provides the substantive law in the present case, the Government remains free to "seek enforcement of the state hazardous waste program in federal court, utilizing federal sanctions." *Id.*

The Eighth Circuit rejected this argument in *Harmon Industries, Inc. v. Browner*, 191 F.3d 894, 899 (8th Cir. 1999), stating that "[t]he plain 'in lieu of' language contained in the RCRA reveals a congressional intent for an authorized state program to supplant the federal hazardous waste program in all respects including enforcement."

The Court finds *Harmon* distinguishable for two reasons. First, *Harmon* was not a criminal action; it was an appeal from an administrative proceeding involving the imposition of civil fines. Second, *Harmon* was not faced with a situation, as exists here, where the EPA, in approving a state hazardous waste program, expressly declined to authorize the state sanctions. This second conclusion requires some explanation.

In the regulations authorizing Idaho's hazardous waste program, the EPA stated that while Idaho "has primary responsibility for enforcing its hazardous waste program," the EPA would retain "the authority to exercise its enforcement authorities under . . . [§ 6928]. . . ." The regulation then goes on to state that the Idaho enforcement and sanction statutes, Idaho Code §§ 39-4413 to 4415, "although not incorporated by reference, are part of the authorized State program."

In a footnote in its earlier opinion, the Court recognized that this phrase gives rise to some confusion, because it seemed to give approval with one hand while taking it back with the other. There is no provision for the EPA to "authorize" the state's sanction statutes, but "not incorporate [them] by reference." Upon reconsideration, however, the Court interprets this language to mean that the EPA was not trying to discourage Idaho's own enforcement, but simply notifying all parties that the EPA would continue to enforce the penalties set forth in § 6928(d), and would not supplant those federal penalties with Idaho's penalties.

This interpretation is confirmed by the EPA's statement in the Federal Register preamble that originally

published 40 C.F.R. § 272.650 *et al.*[1] In that Federal Register preamble, the EPA stated that "[t]he [EPA] retains the authority under [§ 6928] to undertake enforcement actions in authorized States. With respect to such enforcement action, the [EPA] will rely on Federal sanctions . . . rather than the authorized state analog to these requirements. Therefore, the [EPA] does not intend to codify such authorized Idaho enforcement authorities." 55 Federal Reg. 50327 (1990).

When this Federal Register preamble is read together with the EPA regulations, it is clear that the EPA intended to continue to rely on the federal penalties contained in 42 U.S.C. § 6928(d). *See La Environmental Action Network v. U.S.*, 172 F.3d 65, 69 (D.C.Cir. 1999) (reading EPA's language in Federal Register preamble together with EPA regulation). Under these circumstances, the Court cannot find that the EPA's approval of Idaho's program displaced the federal penalties contained in § 6928(d) and replaced them with Idaho's penalties.

The net result of all these findings is that counts two and three of the indictment should have charged crimes under Idaho Code § 39-4408(1), and the penalties for any violation would be provided by 42 U.S.C. § 6928(d). In other words, the substantive provisions of § 6928(d)(2)(A)

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[1] The Government had provided the Federal Register preamble to the Court in a letter supplementing its original briefing in response to Elias's motion to dismiss counts two and three. The Federal Register preamble was not, however, discussed in any of the briefing and so its significance was not considered in the Court's original decision.

– those provisions making it a crime to dispose of hazardous waste without a permit – were supplanted by the EPA's approval of Idaho's program, but the penalty provisions of § 6928(d) – setting forth the fine and the imprisonment requirements – were not supplanted.

The Court must now determine whether these circumstances warrant a reversal of Elias's conviction on counts two and three. The Government asserts that because the state law is identical to the federal law, the mis-citation in the indictment is meaningless, and the convictions on counts two and three should not be set aside.

Under Fed.R.Crim.P. 7(c)(3), "[e]rror in the citation or its omission shall not be ground for dismissal of the indictment . . . or for reversal of a conviction if the error or omission did not mislead the defendant to the defendant's Prejudice." The Ninth Circuit has cited this Rule in upholding indictments that failed to cite the applicable subsection of a statute, *U.S. v. Bonallo*, 858 F.2d 1427, 1431 (9th Cir. 1988), or cited the statute's penalty section rather than its substantive section, *U.S. v. Vroman*, 975 F.2d 669, 670-71 (9th Cir. 1992).

This case, however, presents a more serious problem because the indictment cited not only the wrong statute, but a statute from the wrong jurisdiction. While the Ninth Circuit has not faced this issue, the Third Circuit did in *U.S. v. Hall*, 979 F.2d 320 (3rd Cir. 1992). There, defendant Hall was indicted, and convicted by a jury, for driving while intoxicated in a National Park. The indictment cited a state statute as the substantive offense when it should have cited a federal statute. Hall sought a reversal of his

conviction on the ground that it was based on the wrong statute. The Third Circuit rejected this argument, stating that "[t]his is not a case in which application of the [charged statute] broadened the definition of a federal crime or resulted in punishment more severe than that available under federal law." *Id.* at 323.

Although in *Hall* the indictment contained a state statute when it should have contained a federal statute – the exact opposite of the situation here – the case is nevertheless instructive because it sustained a conviction under the wrong statute from the wrong jurisdiction – precisely the situation faced here. As in *Hall*, there is no evidence here that the charged statute broadened the definition of the crime or would result in punishment more severe than that available under the proper statue. The Court has held above that the federal sanctions of § 6928(d) will apply even when the EPA is prosecuting based on state substantive law, and there is no evidence that the Idaho substantive law is any different from the federal statutes.

Elias has argued, however, that the Idaho Department of Environmental Quality (IDEQ) has interpreted the Idaho law to exempt mining waste in general, which interpretation could be used to argue that the cyanide waste in this case was not covered by Idaho's hazardous waste laws. Elias submitted two letters from the IDEQ, addressing concerns of parties wanting advice on how to deal with various toxins. In its earlier decision, the Court found that there was at least a possibility that Elias could have used these letters as some evidence in his case if he had known that he was being prosecuted under the Idaho law. In other words, the IDEQ's letter interpretations

would have some relevance if Idaho's law was being applied, where they would have no relevance in his trial on federal charges.

In response, the Government asserts that the IDEQ was simply interpreting federal law because the Idaho hazardous waste program incorporates by reference the federal hazardous waste definitions. The Government points out that Idaho has no separate definition of hazardous waste. Of course, this would not matter if the IDEQ was interpreting the federal statutes and regulations in a lenient fashion. In that case, Elias could argue that the indictment's mis-citation prejudiced him because the Idaho program was in fact more lenient due to the IDEQ's interpretations. Elias has not, however, shown that the IDEQ was lenient in interpreting the regulations. The two letters appear to apply the federal hazardous waste definitions, and the Court can find nothing therein indicating that the IDEQ is not willing to follow and apply the federal regulations. In fact, the IDEQ letters cite the applicable federal regulations in providing answers to the inquiries.

CONCLUSION AS TO COUNTS TWO AND THREE

The Court reaffirms the four findings the Court made in its original decision and adds three additional findings based on the arguments made in the Government's motion to reconsider. Those seven findings are as follows: (1) EPA-approved state hazardous waste laws supplant their RCRA counterparts; (2) the EPA retains authority to enforce those approved state laws; (3) When the EPA approves a state program, the EPA loses the authority to

enforce those RCRA provisions with counterparts in the approved state program; (4) When the EPA approves a state program, the EPA retains the authority to enforce RCRA provisions that have no counterparts in the approved state program; (5) In this case, the EPA, by approving Idaho's hazardous waste program, has supplanted the substantive provisions of 42 U.S.C. § 6298(d)(2)(A), and the indictment in counts two and three should have charged violations of Idaho Code § 39-4408(1); (6) In this case, the EPA's approval of Idaho's hazardous waste program expressly retained the penalty provisions of 42 U.S.C. § 6298(d) and did not replace those provisions with Idaho's penalty provisions; and (7) Elias has failed to show any prejudice under Rule 7(c)(3) resulting from the mis-citation in the indictment as the federal and state substantive laws and penalty provisions are the same.

For these reasons, the Court will grant the Government's motion to reconsider and will reinstate counts two and three. Accordingly, the Court will order that the Indictment be amended to reflect that Elias was charged in counts two and three under Idaho Code § 39-4408(1). This will alleviate any concerns that Elias could be prosecuted by the State for a violation of that statute. *See Hamling v. U.S.*, 418 U.S. 87, 117 (1974) (holding that "an indictment is sufficient if it . . . enables [defendant] to plead an acquittal or conviction in bar of future prosecution for the same offense. ").

ANALYSIS OF OTHER MOTIONS

The Court turns next to the Elias's motion to reconsider. Elias contends that because the Court has held that the substantive portions of § 6928(d) are supplanted by Idaho law, and because the conviction under count one for knowing endangerment under § 6928(e) depended on a finding that there had been a violation of one of the substantive provisions of § 6928(d), that count one must be dismissed. The Court disagrees for the same reasons that it refused to dismiss counts two and three. This motion will therefore be denied.

Finally, Elias has moved for a new trial on count four. This motion is based on the Court's prior dismissal of counts two and three, which the Court has now reconsidered. Accordingly, the Court will deny this motion.

ORDER

In accordance with the Memorandum Decision set forth above,

NOW THEREFORE IT IS HEREBY ORDERED, that the Government's motion to reconsider (docket no. 263) is hereby GRANTED, and the conviction of defendant Elias on counts two and three is hereby REINSTATED.

IT IS FURTHER ORDERED, that the defendant's motion to reconsider (docket no. 264) is hereby DENIED.

IT IS FURTHER ORDERED, that the sentencing now set for April 28, 2000, at 9:00 a.m. in the Federal Courthouse in Pocatello, Idaho, shall proceed as scheduled, and shall be based on the defendant Elias having been

convicted of counts one, two, three, and four of the indictment.

IT IS FURTHER ORDERED, that the indictment shall be amended to reflect that counts two and three charge offenses under Idaho Code § 39-4408(1), and the eventual Judgment will reflect that Elks has been convicted under Idaho Code § 39-4408(1) in counts two and three.

IT IS FURTHER ORDERED, that the sanctions for the convictions set forth in counts one, two, and three, are set forth in 42 U.S.C. § 6928(d).

IT IS FURTHER ORDERED, that the motion for new trial as to count four (docket no. 272) is hereby DENIED.

Dated this 26th day of April, 2000.

/s/ B. Lynn Winmill
B. LYNN WINMILL
CHIEF JUDGE,
UNITED STATES
DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

UNITED STATES OF AMERICA, Plaintiff, v. ALLAN ELIAS, Defendant.	)	CR NO. 98-00070-E-BLW MEMORANDUM DECISION AND ORDER

The Court has before it the Defendant's Motion to Dismiss Counts I-III on Void for Vagueness Grounds; or, in the Alternative, a Violation of the Ex Post Facto Clause. The Court held an evidentiary hearing on all pending motions in this case beginning March 4 and concluding with oral arguments on March 9, 1999. At the conclusion of that hearing the Court took the Defendant's motion under advisement. For the reasons set forth below, the Court denies the Defendant's motion to dismiss Counts I-III.

Background

The Defendant seeks to have Counts I, II, and III of the Indictment dismissed. Each of these Counts is based upon an alleged violation of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6901, *et seq.* Common to each count is the allegation that the Defendant illegally stored or disposed of cyanide-bearing "reactive hazardous waste." Federal regulations that

define what constitutes reactive cyanide-bearing hazardous wastes makes up a critical element of the Government's case. The Defendant contends that those regulations are unconstitutionally vague, and that the withdrawal of a guidance and test protocol applicable to those regulations amounts to an ex post facto action that violates the Defendant's constitutional rights.

In brief, the Indictment against the Defendant relates to a series of events that occurred at a facility in Soda Springs, Idaho, operated by the Defendant as Evergreen Resources Inc. According to the Indictment, on August 26, 1996, the Defendant directed his employees to clean sludge from a 25,000 gallon storage tank by washing it out onto the ground outside the tank. The workers developed sore throats and, concerned for their health, stopped working inside the tank. On August 27, the employees advised the Defendant of the problems they had experienced inside the tank. The Defendant directed them to reenter the tank to clean out the sludge, and to use the protective gear available at the business. The protective gear was not designed to protect the workers from exposure to cyanide. While working inside the tank at the Defendant's direction, one of the Defendant's employees, Scott Dominguez, became overwhelmed by the fumes, collapsed into the sludge, and lay in the sludge for an extended period of time because of difficulties encountered in extricating him from the tank. Mr. Dominguez has suffered permanent brain damage. The indictment also alleges that some weeks later, the Defendant disposed of the waste from the tank by dumping it onto the ground at his business establishment.

In considering the Defendant's arguments, it is necessary to briefly review the application of RCRA and its supporting regulations to the facts of this case. The provision of RCRA under which the Defendant is charged makes it a crime to knowingly store or dispose of a hazardous waste. This relatively simple criminal offense is given substance through regulations first promulgated by the Environmental Protection Agency ("EPA") in 1980. Those regulations define a hazardous waste as falling within two categories. The first such category includes specific wastes generated by particular industries or activities. The second category, and the one applicable here, includes substances that have one of four hazardous characteristics – ignitability, corrosivity, toxicity and reactivity. A sub-part of the regulation defines the reactivity characteristic, and provides that a substance shall constitute a reactive hazardous waste, and therefore be subject to the criminal prohibitions of RCRA, if it is "a cyanide or sulfide bearing waste that, when exposed to pH conditions between 2 and 12.5, can generate toxic gases, vapors, or fumes in a quantity sufficient to present a danger to human health or the environment." 40 CFR § 261.23(a)(5).

Stated in a narrative form, this definition of reactivity focuses on the possible harms that make reactive wastes hazardous, rather than on a quantifiable, test-based standard. This approach was taken because of a perceived problem in trying to establish a specific numerically quantified, test-based standard which would apply under all circumstances and in all situations. *See* 45 Fed. Reg.

33110 (May 19, 1980). This approach is apparently acceptable in other regulatory contexts, since the reactivity definition set forth in 40 CFR § 261.23(a)(5) closely parallels the top three reactive classes of the National Fire Protection Association, tracks the definition of reactive wastes used by the Chemical Manufacturers Association, and is substantially similar to the classification system used by the United States Navy.

Despite the concern that it was not possible to adequately measure reactivity with a specific, numerically quantified, test-based measure, the EPA in July 1985, issued its "*Interim Thresholds for Toxic Gas Generation Reactivity* (*§ 261.23 (a)(5)*)" which reads as follows:

> Over the past year, we have received many inquiries about how to evaluate wastes for reactivity (§ 261.23(a)(5)). We have initiated a number of studies in this area, and expect to propose a quantitative threshold for toxic gas generation reactivity in December of this year. On an interim basis, however, we feel strongly that wastes releasing more than the following levels of toxic gas should be regulated as hazardous wastes:
>
> Total Available Cyanide:
> 250 mg HCN/Kg waste
>
> Total Available Sulfide:
> 500 mg H_2S/Kg waste
>
> The available cyanide and sulfide should be measured using the attached draft testing methods.

Although it was suggested that a final threshold would be issued in six months, none was ever issued. However

the interim threshold was republished in the EPA's "Test Methods for Evaluating Solid Waste, Physical/Chemical Methods," SW-486, a methods manual which was subsequently incorporated by reference into the RCRA regulations. However, it appears to be undisputed that the Defendant was unaware of the interim threshold and never attempted to use the SW-486 test protocols to determine whether the cyanide-bearing sludge exceeded the interim thresholds.

The Dominguez incident occurred during the summer of 1996. On the day following the incident, samples of were [sic] taken from the tank. When tested using the cyanide reactivity test established by the interim threshold, results ranging from .285 to 2.47 mg/kg-wet of Reactive Cyanide were obtained. Obviously these were far below the standards of 250 mg HCN/Kg waste. It is this test result that fuels the Defendant's argument that the regulatory standards are impermissibly vague.

On April 21, 1998, and possibly as a response to the test results obtained from the Defendant's tank, the EPA withdrew the interim threshold. In doing so, it stated:

> Until revised guidance is developed, we reiterate the RCRA regulatory language. That is, 40 CFR § 261.23(a)(5) specifies that human and health and the environment must not be endangered by evolved toxic gases when these wastes are exposed to pH conditions between 2 and 12.5. Any waste causing a hazard, when in the pH range of 2-12.5 would certainly be considered a characteristic hazardous waste.

See Memorandum of David Bussard, Director of EPA Hazardous Waste Identification Division, OSWER, to

Diana Love, Director, NEIC, April 21, 1998. The Defendant contends that this withdrawal of the interim threshold constitutes an unconstitutional ex post facto law.

Discussion

The Defendant's motion to dismiss Counts I, II, and III of the indictment can best be addressed by first considering what role the interim thresholds played in the regulatory scheme. The Defendant contends that the interim threshold and accompanying test methods constituted "the" standard for determining whether a reactive substance constituted a hazardous waste at the time of the incident giving rise to this Indictment. In support of this argument, the Defendant points to the EPA's failure to implement any final guidance, leaving the interim thresholds in effect for 13 years. The Defendant also relies on the EPA's incorporation of the interim thresholds into its official methods manual, which was, in turn, incorporated into federal regulations. Finally, the Defendant refers to various internal memoranda, in which EPA officials have made statements suggesting that the interim threshold has been broadly used in enforcing the RCRA regulations and statutes.

The Government, on the other hand, contends that the interim threshold constitutes a non-binding guidance that proposed a test method for determining whether cyanide-bearing was reactive. It was intended, the Government argues, only to establish the outside limits of what was clearly regulable. If the test method is used, and toxic gas was released above the levels set forth in

the interim thresholds, the releasing waste would be regulated as hazardous waste. However, if the waste released toxic gas below the threshold levels, nothing in the interim threshold suggested that the waste would not be subject to regulation. In short, the Government contends that the interim threshold did not provide a "safe harbor" for wastes that emitted toxic gas below the threshold levels.

The Court finds the Government's perception of the interim thresholds correct. A review of the language used in the interim threshold clearly suggests that it was an effort by the EPA to establish standards for the most extreme health- and environment-threatening forms of cyanide that would be regulable under all circumstances and in all settings. The operative language of the interim threshold – those words that state the legal effect of the quantified standards – clearly indicates as much; "On an interim basis . . . we feel strongly that wastes releasing more than the following levels of toxic gas should be regulated as hazardous wastes." Nothing in that language suggests that the interim threshold is stating a "safe harbor" rule for wastes that fall below the threshold levels. To the contrary, the language used clearly indicates that it is intended, on an interim basis, to indicate those substances that are clearly regulable and subject to the RCRA criminal and civil provisions.

This view of the interim threshold has two significant impacts on the Defendant's motion to dismiss. First, it requires that we consider whether the regulations are unconstitutionally vague by looking at the narrative definition, without considering the effect of the interim

thresholds.[1] Second, it effectively disposes of the ex post facto claim, since withdrawing the interim threshold did not effect a change in the law applicable to the Defendant.

Turning then to the Defendant's vagueness challenge, the Court notes that in the criminal context, a statute or regulation cannot be challenged as vague on its face, but only as applied. *See United States v. Martinez*, 49 F.3d 1398, 1403 (9th Cir. 1995), *cert. denied*, 116 S.Ct. 749 (1996). Furthermore, where a regulation is challenged as vague as applied, the challenge must be based on the facts at hand, and not on hypothetical applications. *See United States v. Johnson*, 130 F.3d 1352, 1354 (9th Cir. 1997). The fundamental question in determining whether a regulation is impermissibly vague is whether a defendant has fair notice that certain conduct is forbidden. *See United States v, Ayala*, 35 F.3d 423, 425 (9th Cir. 1994), *cert. denied*, 115 S.Ct. 1365 (1995). This notice must be examined in light of the conduct in which the Defendant is charged. *See United States v. E. C. Investments, Inc.*, 77 F.3d 327, 331-32 (9th Cir. 1996).

In the present case, it would be preferable to have some numerically-quantified, test-based standard for determining whether a substance releasing cyanide gas should be deemed hazardous, and thus subject to the

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[1] Even if the Court were inclined to find that the interim threshold was an integral part of the regulations which provided a safe harbor for a waste generator, the Defendant could not avail himself of this argument because of the lack of any evidence that he knew of the threshold or attempted to comply with it.

instant regulations. However, that is not possible in the regulation of cyanide gas given the variety of situations and circumstances in which cyanide may exist and pose a hazard to the public health and the environment. For example, in a closed and confined area without ventilation, such as a tank, a specific quantity of cyanide gas would be much more hazardous than if the same quantifiable amount were found in an open area with unlimited ventilation, such as a large open field with a breeze blowing. This type of problem has long been recognized by the EPA with regard to reactive substances. *See* 45 Fed. Reg. 33110 (May 19, 1980). Although the EPA's issuance of the interim standard suggests that it intended to make an attempt at establishing numerically-quantified, test-based standards, the interim standard itself suggests uncertainty as to whether that could be accomplished, and the record as a whole indicates a great deal of concern by EPA officials as to whether such standards are possible.

A numerically-quantified, test-based standard is not required to survive a vagueness challenge. Narrative descriptions of what constitutes hazardous waste have been approved by the Courts in the face of a void-for-vagueness charge. *See, e.g., United States v. Clark*, 912 F.2d 1087, 1090 (9th Cir. 1990) (a regulation prohibiting "wasteful" taking of "substantial portions" of walruses is not unconstitutionally vague); *United States v. Kennecott Copper Corp.*, 523 F.2d 821, 823-24 (9th Cir. 1975) (the failure to define "harmful quantities" does not render the Clean Water Act's oil spill notification requirements vague); *United States v. White*, 766 F.Supp. 873, 881-82 (E. D. Wash. 1991) (RCRA's use of words "disposed" and

"discarded" for defining waste are not unconstitutionally vague despite the EPA's concession that the definition of solid waste and hazardous waste are difficult to understand and implement). The test for vagueness is not whether a narrative regulation could have been more quantitatively specific, but whether the narrative regulation gives adequate notice to those persons who may be subject to its provisions as to what constitutes illegal activity. *See Ayala*, 35 F.3d at 425.

It is also significant that the vagueness test in a criminal case is "as applied." A Court must look at the sufficiency of the notice provided in the context of the conduct with which the defendant is charged. *See E. C. Investments, Inc.*, 77 F.3d at 331-32. A regulation is not vague if its provisions arise under circumstances where any reasonable person clearly understands that their conduct is prohibited. *See United States v. Erickson*, 75 F.3d 470, 475-76 (9th Cir.), *cert. denied*, 116 S.Ct. 1853 (1996); *Ayala*, 35 F.3d at 425. In other words, the question is whether a reasonable person, in the Defendant's circumstances, would have known that his conduct created risk to others. In the present case, the Defendant had a specialized knowledge of the use of cyanide and regulations applicable to its use. He was further aware of previous health complaints of his employees related to their work around the cyanide in this case. Clearly a reasonable person in the Defendant's circumstances would have known of the "hazardous" nature of a substance without a numerically-quantified, test-based standard.

Furthermore, the test for vagueness may consider the understanding of the regulated community. *See United States v. Weitzenhoff*, 35 F.3d 1275, 1289 (9th Cir. 1993),

cert. denied, 115 S.Ct. 939 (1995). The EPA's narrative description of reactive hazardous waste paraphrases the description of reactive classes of substances by the National Fire Protection Agency, tracks the definition of reactive wastes used by the Chemical Manufacturers Association, and is similar to the classification system used by the United States Navy. It is appropriate to use language that appears vague to lay persons, but has particular meaning within the industry. *Id.*

The Defendant further contends that the regulation is impermissibly vague because it defines criminal activity based upon the consequences, or potential for harm, caused by unsafe handling of reactive wastes. However, this is not problematic because a key protection to Defendant from unfair prosecution is the requirement of intent. In order to prove the charges against the Defendant, the Government must show that the Defendant acted with knowledge of the unsafe nature of the substance and its potential for harm. *See United States v. Heuer,* 4 F.3d 723 (9th Cir. 1993); *United States v. Hoflin,* 880 F.2d 1033, 1039 (9th Cir. 1989). Under these circumstances, the Court cannot find that the RCRA regulations which provide the basis for Counts I, II, and III are unconstitutionally vague.

The Court also finds the Defendant's ex post facto argument to be without merit. As the Court has previously explained, that argument ignores the fact that the law itself has not changed. The withdrawal of the interim threshold did not affect the overall effect of the regulation, which prohibited the storage of harmful reactive substances that emitted substances harmful to the public health or the environment. The Defendant might have

made a successful claim of regulatory estoppel, if he were aware of the interim threshold and could show actual reliance upon it. *See Weitzenhoff*, 35 F.3d at 1290 (*citing United States v. Lansing*, 424 F.2d 225, 227 (9th Cir. 1970)); *United States v. Brebner*, 951 F.2d 1017, 1024 (9th Cir. 1991) (*citing United States v. Tallmadge*, 829 F.2d 767, 773 (9th Cir. 1987)). However, that is not the case here, and there is no basis for applying the ex post facto protection in this setting.

For all of the foregoing reasons, the Court concludes that the Defendant's motion to dismiss must be denied.

Order

NOW THEREFORE IT IS HEREBY ORDERED that the Defendant's Motion to Dismiss Counts I-III on Void for Vagueness Grounds; or, in the Alternative, a Violation of the Ex Post Facto Clause (Docket No. 38) shall be, and the same is hereby, DENIED.

Dated this 18th day of March, 1999.

/s/ B. Lynn Winmill
B. LYNN WINMILL
UNITED STATES
DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

UNITED STATES OF AMERICA,	)	Cr. No. 98-0070-E-BLW
Plaintiff,	)	MEMORANDUM DECISION AND ORDER
v.	)	
ALLAN ELIAS,	)	(Filed Dec. 9, 1999)
Defendant.	)	

INTRODUCTION

The Court has before it a motion for new trial filed by defendant Allan Elias. The motion is fully briefed and at issue. The Court finds that Elias has made out a prima facie case of jury tampering[1] and is entitled to a

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[1] The Court uses the term "jury tampering" with some reservation. That term suggests an active attempt by an outside party to interfere with the jury's independence and decision-making. There is no indication that such interference occurred here. However, the term "jury tampering" has become almost a word of art, and has been used to describe a wide variety of incidents which called into question whether the jury was improperly subjected to outside influences which may have affected the reliability of the jury's decision. In this case, as the Court will discuss, there is evidence that the jury foreperson believed that the Defendant attempted to influence the vote of another juror. It may be more accurate to describe these circumstances as "perceived" jury tampering – that is, the foreperson perceived that the Defendant attempted to influence another juror. At any rate, when the Court uses the term jury tampering in this decision, it is referring to the Defendant's prima facie showing that the foreperson perceived that the Defendant attempted to influence the vote of another juror.

presumption that he was prejudiced thereby. The Court will reserve ruling, however, on whether the Government is able to rebut that presumption or whether a new trial is necessary. The Court finds that an earlier evidentiary hearing was too limited in scope either to provide a total picture of the tampering allegations or to give the Government a full opportunity to rebut the presumption of prejudice. For those reasons, the Court will set up a full evidentiary hearing, and then render a final ruling on the motion for new trial after that hearing. The Court will explain its reasoning in more detail below.

FACTUAL BACKGROUND

On May 7, 1999, following a three-week trial, a jury convicted Elias of making false statements to the Government, improperly handling hazardous waste, and endangering his employees by exposing them to that waste. On June 16, 1999, more than a month after that conviction, the Government prosecutors conducted a telephone conference with the jury foreperson, Boyd Greenlee, to discuss the trial. During that conference, Greenlee told the prosecutors that during the trial, he had heard from another juror that Elias had approached that juror and asked her "what it would take to buy her off." *See Transcript of June 23, 1999, hearing* at 5. The prosecutors immediately informed the Court of Greenlee's statements, and notified defense counsel that the Government would be seeking to detain Elias prior to sentencing based on Greenlee's statements.

The Court conducted an evidentiary hearing on July 2, 1999. The hearing occurred in chambers with each of

the available jurors called one at a time, placed under oath, and questioned by the Court.[2] Counsel were not permitted to ask questions, but they could relay additional questions to the Court, who would then ask the questions.

In response to the Court's questioning, Greenlee stated that during the "middle of the trial," another juror told her fellow jurors, including Greenlee, that Elias had "approached" her and asked her "what would it take to turn her decision. " *See Transcript of July 2, 1999, hearing* at 20, ll. 5-10. At another point during the Court's questioning, Greenlee again paraphrased the juror's accusation against Elias: "she [the juror] mentioned that he [Elias] said what would it take to win your vote." *Id.* at 20, ll.2-3. Greenlee understood that the juror had been approached by Elias in the parking lot of the Federal Courthouse as the juror was returning from a trial recess on her way to the jury room. *Id.* at 30, ll. 1-17. Greenlee could not remember the name of the juror who made this accusation, but he did describe her hair color and seating position within the jury box, establishing that she was the third alternate, Janet Scott.

The following colloquy then occurred between the Court and Greenlee:

> Court: Did you understand – or what was your understanding as to the tone or nature of Mr. Elias' remark?

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[2] Three of the jurors were not available, and have not been questioned.

Greenlee: I kind of think maybe he was just joking. I wasn't there, so I didn't hear. This is just hearsay.

Court: Sure.

Greenlee: This is just what she repeated. And he was maybe trying to just kind of make her feel a little bit at ease. I don't know. I don't know what the whole entire thing was about that.

Court: But that was your understanding, is that it was somewhat in jest?

Greenlee: Yeah.

Court: Did this juror indicate as much?

Greenlee: Yeah, I think so. I think she didn't really feel totally uncomfortable about it.

. . . .

Court: Now, at the time, I think both at the beginning of the trial and at the end of the trial, the Court instructed you, that is, the jury, that the decision was to be made solely from the evidence presented in the courtroom and in the context of my instructions as to the law. I also, as I recall, specifically advised you that certain matters were not evidence and were not to be considered by you, and those included things that may have been said or done by the parties, the attorneys, or the witnesses when they were not in the courtroom.

Were you able to follow my instructions in that regard?

Greenlee: Yes.

Elias denied making any such statement to Scott. None of the other jurors questioned by the Court during the July 2, 1999, hearing recalled hearing Scott recount to them that Elias had approached her and asked what it would take to "win" or "turn" her vote.

ANALYSIS

Elias's strongest argument is that Greenlee believed that Elias had attempted to influence the vote of Scott, and that Greenlee was therefore biased against Elias. In dealing with this charge that one of the jurors may have perceived that the defendant attempted to influence another juror, the Court is guided by the Supreme Court's decisions in the *Remmer I* and *Remmer II* cases. *See Remmer v. United States*, 347 U.S. 227 (1954) (*Remmer I*); *Remmer v. United States*, 350 U.S. 377 (1956) (*Remmer II*).

In *Remmer I*, the Supreme Court was faced with a case where the district court – without holding any kind of a hearing – had denied a motion for new trial based on jury tampering. In the motion, the defendant asserted that after his conviction on tax evasion, he learned that the jury foreperson, one Smith, was approached by a third party, one Satterly, who told Smith that the defendant had $300,000 from a recent sale of property, and asked Smith "[w]hy don't you make a deal with [the defendant]." *Remmer II*, 350 U.S. at 380. Smith told the trial judge, who had the Federal Bureau of Investigation compile a report on the incident. The trial judge and the

prosecutor then examined the report and decided solely between themselves that the incident was meaningless. When the defendant later discovered what had happened, he filed a motion for new trial and request for a hearing, all of which was denied by the district court.

The Supreme Court in *Remer* [sic] *I* treated the incident more seriously than the district court:

> In a criminal case, any . . . tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial. . . . The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant.

The Supreme Court remanded the case to the district court to "determine the circumstances [of the alleged tampering], the impact thereof upon the juror, and whether or not it was prejudicial, in a hearing with all interested parties permitted to participate." *Id.* at 230.

The district court then held a hearing in which 27 witnesses were called. *See U.S. v. Remmer,* 122 F.Supp. 673 (D.Nev. 1954). It appears that the Government had the full opportunity to examine the witnesses because the district court's decision notes that "[t]he Government assumed the burden of proceeding with the evidence." *Id.* at 673.

On the basis of the evidence presented at that hearing, the district court found (1) that "[f]oreman Smith regarded the comment of Satterly as being jocular," *id.* at 674; (2) that "later, after turning the incident over in his

mind, and being mindful of the admonition of the court, [Smith] reported it to the trial judge," *id.*; (3) that the incident was not communicated to any of the other jurors; and (4) that the "presumption of prejudice is conclusively dispelled" because the incident "did not have the slightest bearing upon the integrity of the verdict nor the state of mind of the foreman of the jury, or any of the members of the jury." *Id.* at 675.

On appeal, the Supreme Court reversed in *Remmer II*. In that case, the Supreme Court stated that because the district court had a "paucity of information relating to the entire situation," and because the Government labored under "the presumption which attaches to the kind of facts alleged by the [defendant]," the district court was required to conduct a "full hearing" where the "entire picture should be explored." *Id.* at 379-80. The Supreme Court took the district court to task for too narrowly construing its mandate, and then proceeded to interpret the evidentiary record much differently than the district court. The Supreme Court concluded that Smith was "disturbed and troubled" by Satterly's approach, *id.* at 381, and that the district court could not properly find that "[Smith] was not affected in his freedom of action as a juror." *Id.* It was the district court's "unduly restrictive interpretation" of its mandate, the Supreme Court held, that "had the effect of diluting the force of all the other facts and circumstances in the case that may have influenced and disturbed Smith in the untrammeled exercise of his judgment as a juror." *Id.* at 382.

Remmer I and *II* hold that when a defendant makes a prima facie showing of jury tampering, a presumption of prejudice arises that requires the district court to hold a

full hearing to investigate all the circumstances surrounding the alleged tampering. The Supreme Court intends the hearing to provide (1) the district court will [sic] all the facts, and (2) the Government with an opportunity to rebut the presumption of prejudice.

The Ninth Circuit has recently reaffirmed its allegiance to the tampering aspects of *Remmer I* and *II* in *United States v. Dutkel*, 192 F.3d 893 (9th Cir. 1999). The Circuit noted that while the Supreme Court has retreated from presuming prejudice in cases involving "more prosaic kinds of jury misconduct," the Supreme Court has never backed off from *Remmer* in cases of jury tampering. The Circuit went on to explain why:

> Jury tampering is a much more serious intrusion into the jury's processes and poses an inherently greater risk to the integrity of the verdict. While we presume that jurors will disregard the advice of friends and ignore other ex parte contacts, we can indulge no such presumption where jury tampering is involved.

Id. at 895.

The Circuit then went on to define jury tampering: "an effort to influence the jury's verdict by threatening or offering inducements to one or more of the jurors." *Id.* The type of tampering that triggers the presumption of prejudice occurs both in the case where a juror was personally offered inducements by the defendant, and in the case where a juror suspected that another juror was offered inducements by the defendant: "Where the intrusion is (or is suspected to be) on behalf of the defendant raising the claim of prejudice, the presumption arises

automatically because jurors will no doubt resent a defendant they believe has made an improper approach to them." *Id.* at 897.

The initial burden is on the defendant to make a prima facie showing of jury tampering. *Id.* at 897. Once the defendant has established a prima facie case, the Court is bound to hold a *Remmer* hearing that "begin[s] with a strong presumption that the jury tampering affected the jury's decision-making." *Id.* at 899. "The burden rests heavily upon the Government to prove otherwise." *Id.* (quoting *Remmer,* 347 U.S. at 229). The inquiry should "focus on whether [Elias's] overtures affected [Greenlee's] behavior – and the behavior of the other jurors – during deliberations." *Id.* "The Government must show that there is no reasonable possibility that [Greenlee] (or any other juror) was affected in his freedom of action as a juror." *Id.* at 899. To put it another way, "[u]nless the district court is convinced that there is no reasonable possibility that the deliberations . . . were affected by the tampering, the Court must vacate [the] conviction." *Id.*

In the present case, Elias has made a prima facie showing of jury tampering sufficient to raise the presumption of prejudice. Regardless of whether Elias actually approached juror Scott, Elias has at least made a prima facie showing that Greenlee believed that Elias had approached Scott and asked her what it would take to "win" or "turn" her vote. It matters little that Elias's approach was less direct than an offer of a sum certain of cash in return for a vote of acquittal. The "name your price" or "what will it take" approaches are every bit as much inducements to influence decisions as direct offers

of cash. This type of less direct approach did not distract the Supreme Court in *Remmer.* There, the offeror told the jury foreman that the defendant had recently sold a piece of property and had some money at his disposal, and urged the foreman to "make a deal" with the defendant. *Remmer,* 350 U.S. at 380. There was no direct inducement such as the offer of a payment in cash in return for a vote of acquittal. Nevertheless, the Supreme Court did not hesitate to find that a showing of tampering had been established sufficient to trigger the presumption of prejudice.

The Government asserts, however, that Greenlee took Elias's comments to Scott as a joke. Greenlee did testify that "I kind of think maybe he [Elias] was just joking," *see transcript of July 2, 1999, hearing* at 21, ll. 19-20, and at another point answered "yes" to the Court's question whether Elias's approach was "somewhat in jest?" *Id.* at 22, ll. 2-4. But Greenlee hedged these descriptions by pointing out that "I wasn't there, so I didn't hear," and "I don't know what the whole entire thing was about that." *Id.* Greenlee's attempt to qualify his assertion leaves it unclear as to how much weight he gave to his apparent belief that Elias had approached a juror. If Greenlee viewed the approach as "somewhat" in jest, did he still give it some weight in his deliberations? Greenlee did indicate that he followed the Court's admonition not to consider any extrinsic evidence; however, his specific charge of tampering requires more detailed questioning than was permitted in the limited hearing on July 2, 1999. As in *Remmer II,* the fact that Greenlee raised the issue indicates that it occupied some importance in his mind.

It is generally not difficult to establish a prima facie case. Elias has raised a serious issue whether Greenlee believed that Elias attempted to influence Scott. On the basis of the limited record in this case, the Court cannot find that Greenlee treated the incident as a joke and ignored it in his deliberations. That issue will require further hearings, discussed more fully below. The Court therefore finds that Greenlee has made a prima facie case of tampering.

A presumption of prejudice therefore arises, and the Government has the burden of rebutting that presumption by showing "that there is no reasonable possibility that the deliberations . . . were affected by the [alleged] tampering." *Dutkel*, 192 F.3d at 899. To give the Government an opportunity to rebut the presumption, the Court is directed by *Remmer I* and *II* to hold a "full hearing" where "the entire picture should be explored." *Remmer II*, 350 U.S. at 379.

While this Court did hold a hearing, it was not the type of extensive hearing, envisioned by *Remmer I* and *II*, covering all of the circumstances surrounding the alleged tampering. In that hearing, held as discussed above on July 2, 1999, the Court asked a short series of limited questions to each juror. With all jurors except Greenlee, the Court merely asked them if they had heard any juror describe an incident similar to the alleged tampering reported by Greenlee. The Court did ask a few more questions of Greenlee, but never examined all the circumstances surrounding the incident and its effect on the jurors.

There are at least three areas of important concern that were not covered by the Court at the July 2, 1999, hearing. First, the Court did not ask Greenlee why he failed to disclose the incident to the Court during the trial. Was it because the incident was unimportant to him, or was it because of some other reason? Second, the Court's questions, and Greenlee's answers, did not nail down whether Greenlee ignored the alleged tampering as a joke. As discussed above, the limited nature of the hearing rendered counsel unable to clarify Greenlee's numerous qualifications that left it unclear how he perceived the incident. Third, assuming that Greenlee perceived that Elias attempted to influence Scott, did Greenlee act upon that perception in any way through his conduct with fellow jurors? Did other jurors notice anything in Greenlee's conduct consistent with Greenlee's perception? This is a particularly critical question, given Greenlee's role as foreperson during the jury's deliberations.

These and other matters were never covered in the July 2, 1999, hearing. The Court therefore does not have, as *Remmer I* and *II* require, the total picture of the circumstances surrounding the alleged tampering and its impact on the jury. In addition, the Government has never had its full opportunity, as required by *Remmer I* and *II*, to rebut the presumption of prejudice. For these reasons, Elias's motion for new trial will be granted in part with the remainder reserved. The Court will grant that part of the motion seeking a ruling that Elias has established a prima facie case of jury tampering sufficient to raise a presumption of prejudice. The Court reserves ruling on the

remainder of the motion until the Court can hold a full evidentiary hearing.

The Court will set the hearing date for January 7, 2000, at 9.00 a.m. in the Federal Courthouse in Pocatello, Idaho. The Court will direct the Government to subpoena the jurors to appear on that date. At that hearing, the Government will have the burden of rebutting the presumption of prejudice. The Government must show that "there is no reasonable possibility that the deliberations . . . were affected by the [alleged] tampering." *Dutkel*, 192 F.3d at 899. In making this determination, the Court and counsel "may not inquire into any juror's mental processes, but rather must focus on conduct." *Id.*; *see also* Fed.R.Evid. 606(b).

The Court will permit the Government and defense counsel to question jurors under the strict guidance of the Court. The Government and defense counsel may subpoena witnesses other than the jurors after notice to the other side and approval by the Court. The parties shall exchange witness lists on or before January 3, 2000. No further briefing shall be permitted prior to the hearing. No depositions or pre-hearing discovery shall be permitted.

The Court is mindful that the January 7 hearing date may place the Government under unfair time pressures. The Court is also aware that the jury's verdict was entered more than 6 months ago, and the final resolution of this case has been delayed for a number of reasons, none of which can be attributed to the Government. There is a need to bring this case to a final conclusion. Nevertheless, given the Government's heavy burden in

this case, the Court will consider a request from the Government for a brief continuance of the hearing date so as to provide it with a full and fair opportunity to rebut the presumption of prejudice which exists in this case.

The Court recognizes that there are other pending motions. Those motions will be held in abeyance until the Court resolves the motion for new trial following the hearing.

ORDER

In accordance with the Memorandum Decision above,

NOW THEREFORE IT IS HEREBY ORDERED, that the motion for new trial (docket no.206) is hereby GRANTED IN PART AND RESERVED IN PART. The motion is granted to the extent it seeks a ruling that defendant has established a prima facie showing of jury tampering sufficient to raise a presumption of prejudice. The motion is reserved in all other respects until the Court can hold an evidentiary hearing.

IT IS FURTHER ORDERED, that an evidentiary hearing shall be held on **January 7, 2000, at 9:00 a.m.** in the Federal Courthouse in Pocatello, Idaho.

IT IS FURTHER ORDERED, that the Government is directed to subpoena the jurors who rendered a verdict in this criminal matter to appear at the Federal Courthouse in Pocatello, Idaho on the date and time above stated.

IT IS FURTHER ORDERED, that the parties shall exchange witness lists on or before January 3, 2000, and

that the hearing shall be conducted as set forth in the Memorandum Decision above.

Dated this 9th day of December, 1999.

/s/ B. Lynn Winmill
B. LYNN WINMILL
CHIEF JUDGE, UNITED STATES
DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

UNITED STATES OF AMERICA,	)	Cr. No. 98-0070-E-BLW
Plaintiff,	)	MEMORANDUM DECISION
v.	)	
ALLAN ELIAS,	)	(Filed Jan. 6, 2000)
Defendant.	)	

INTRODUCTION

The Court held a hearing with all counsel on January 6, 2000, to discuss the procedures the Court would follow at the hearing set for tomorrow. The Court began by advising counsel of its new analysis of the case, and then listened to comments from counsel on that analysis. This decision is an attempt to put down in writing the analysis that the Court discussed verbally with counsel. In addition, the Court will advise counsel of its leanings on certain issues raised by counsel.

ANALYSIS

This case has elements of jury tampering, juror misconduct, and juror bias. The Court's prior opinion focused on the tampering issue, without fully recognizing and addressing the other two issues.[1] The three issues arise sequentially, with the tampering issue leading off.

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[1] The Court set forth the factual background in its earlier Memorandum Decision filed December 9, 1999. The Court will not repeat that discussion here, but will assume that the reader is familiar with that discussion.

Tampering is defined in *United States v. Dutkel*, 192 F.3d 893, 895 (9th Cir. 1999) as "an effort to influence the jury's verdict by threatening or offering inducements to one or more of the jurors." When a *prima facie* showing is made that tampering occurred, a rebuttable presumption arises that the defendant was prejudiced thereby. *Id.* Not much is required to meet the *prima facie* threshold. *Dutkel* held that even a juror's suspicion that the defendant tampered with a juror was enough to raise a *prima facie* case. *Id.* at 897. Foreperson Greenlee's testimony at the July 2, 1999, hearing that juror Scott told him that Elias had approached her in the parking lot and asked her what it would take to "win" or "turn" her vote satisfies the low threshold of a *prima facie* case, and triggers the requirement that a hearing be held.

At that hearing, the Court must answer two questions regarding the tampering issue: (1) Did the tampering occur?; (2) If tampering occurred, has the Government rebutted the presumption of prejudice that attaches? Jurors are competent witnesses to testify about tampering under Rule of Evidence 606(b) because tampering constitutes an "outside influence," an express exception to the Rule's general proscription against inquiring into the jury's deliberative process.

If the Court finds that no tampering took place, the second of the three main issues arises: juror misconduct. More specifically, the issue is whether juror Scott accused Elias of tampering. If she made that accusation, she interjected extraneous information into the jury room. "Once a juror has . . . infect[ed] the deliberations with extrinsic material, a new trial is warranted if there is a 'reasonable possibility' that it could have affected the verdict."

Bayramoglu v. Estelle, [sic] 880, 887 (9th Cir. 1986). The government bears the burden of rebutting the presumption of prejudice which attaches when it has been shown that the jury was exposed to extrinsic evidence. *See United States v. Bollinger,* 837 F.2d 436 (9th Cir. 1988). Jurors are competent witnesses to testify about inter-juror accusations made against the defendant because Rule 606(b) contains an exception for "extraneous prejudicial information."

If the Court concludes that no tampering took place, and that no accusation was made, the third issue arises: juror bias. Greenlee appears to believe that Scott accused Elias of tampering. This raises a question whether Greenlee developed a bias against Elias since "jurors will no doubt resent a defendant they believe has made an improper approach to them." *Dutkel,* 192 F.3d at 897.

The existence of juror bias violates a defendant's Sixth Amendment right to a fair and impartial jury if it results in the denial of a fair trial. *See Bayramoglu,* 806 F.2d at 888. "The presence of a biased juror cannot be harmless; the error requires a new trial without a showing of actual prejudice." *Dyer v. Calderon,* 151 F.3d 970, 973, n. 2 (9th Cir. 1998) (en banc). The defendant has the burden of showing actual or implied bias. *See United States v. Hanley,* 190 F.3d 1017, 1030 (9th Cir. 1999). Implied bias is reserved for the "extraordinary" or "rare" case. *Dyer,* 151 F.3d at 981, 984.[2]

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[2] It appears that the defense is also claiming that Greenlee failed to answer properly questions posed during voir dire. Under *Dyer v. Claderon,* 151 F.3d 970 (9th Cir. 1998) (en banc), this issue falls under the juror bias category. The Court will give the defense the opportunity at the hearing to raise this issue.

Without regard to Rule 606(b), Greenlee's bias would be examined by (1) asking him to recount what was said in the conversation with juror Scott, and, (2) if Greenlee recalled that Scott had accused Elias of tampering, asking how that affected his deliberations, *i.e.*, how much weight he gave to the accusation, whether he thought Scott was serious or joking, etc.

However, under Rule 606(b), a juror is incompetent to testify about the deliberative process with two exceptions. Testimony is permitted on the questions of "whether extraneous prejudicial information was improperly brought to the jury's attention" and "whether any outside influence was improperly brought to bear on any juror." Jurors "may not testify as to how they or other jurors were affected by the extraneous prejudicial information or outside influence; they may only testify as to its existence." *Hard v. Burlington Northern R.R. Co.*, 870 F.2d 1454, 1461 (9th Cir. 1989).

Rule 606(b) focuses on the deliberative process. Thus, while Greenlee could not testify about how his deliberations were affected by Scott's accusation, he could testify about how the accusation affected him when he heard it, a time period some days prior to the jury's deliberations. It was just this type of testimony – that is, testimony concerning the effect of an improper contact on the juror at the time the juror heard it – that the Supreme Court considered crucial in resolving a challenge to a verdict in *Remmer v. United States*, 350 U.S. 377 (1956). While *Remmer* was decided before Rule 606(b) was in effect, the common law proscriptions against a juror's testimony, in effect during *Remmer*, were very similar to Rule 606(b). *See* 27 Wright & Gold, *Federal Practice and Procedure*, § 6071 (1990). And the Ninth Circuit has also considered

important the testimony of jurors regarding the impact of the contact upon them at the time the contact was made. *See United States v. Angulo*, 4 F.3d 843, 848 (9th Cir. 1993) (finding "particularly instructive" a case requiring a new trial because some jurors testified they were "frightened" by an improper contact, and citing with approval another case denying a new trial where jurors viewed the contact as a "harmless prank.").[3] While Angulo is not directly on point because it never discussed Rule 606(b), it is of some assistance because it discussed the "essential facts" the Court needs to "properly evaluate a defendant's motion for mistrial." *Id.* at 848.

The Court finds it unnecessary at this time to go any further into the Rule 606(b) issue. The Court may well decide, upon later reflection, to disregard testimony that is allowed at the hearing tomorrow. This decision will serve as a guide to counsel as to how the Court is viewing the evidentiary issues, and is subject to change depending on the context of the hearing.

At the hearing, the Government stated it intended to call an Assistant United States Attorney (AUSA) and another AUSA who was, at the time of the trial, a law clerk for the Court and a bailiff at the trial. The Court is

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[3] By allowing testimony on the impact of the contact on the juror, the Court means that the juror may testify regarding how he viewed or characterized the contact at the time the contact was made. Was the juror frightened or did he view the contact as a joke or harmless prank? The Court will not allow the juror to testify about how the contact affected his ability to be fair and impartial, even if the testimony is limited to the time of the contact. Such testimony intrudes into the domain proscribed by Rule 606(b).

inclined to deny any testimony from these two witnesses but will await the hearing to make any final ruling.

The Court's opinion of December 9, 1999, may have been confusing because it appeared to put all of the burden of proof on the Government. There may be, however, a scenario where the defendant bears the burden of proof. If the Court finds that no tampering occurred, and that Scott did not make the accusation about Elias to Greenlee, all that remains is the juror bias issue, and Elias has the burden of proving juror bias.

The Court does not mean to imply, however, that this analysis is set in concrete. The Court finds persuasive defense counsel's argument that the analysis has an Alice in Wonderland quality: A defendant who tampers with a jury has an easier road to a new trial than a defendant who did nothing but is faced with a juror who thought the defendant tampered. It is also difficult to understand how a trial could pass muster under the Sixth Amendment when one juror perceived that the defendant tampered with the jury. These are the difficult issues the Court is still struggling with.

Dated this 6th day of January, 2000.

/s/ B. Lynn Winmill
B. LYNN WINMILL
CHIEF JUDGE, UNITED STATES
DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

UNITED STATES OF AMERICA,

Plaintiff,

v.

ALLAN ELIAS,

Defendant.

Cr. No. 98-0070-E-BLW

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

(Filed Jan. 25, 2000)

INTRODUCTION

The Court has before it a motion for new trial filed by defendant Elias. To investigate allegations of jury tampering and suspected tampering raised by the motion and the responses thereto, the Court held evidentiary hearings on July 2, 1999, and January 3 and 7, 2000. On the basis of evidence admitted at those hearings, the Court finds that no actual jury tampering occurred. Elias argued nevertheless that two jurors erroneously suspected that he tampered with the jury, violating his right to an impartial jury. The Court finds that these two jurors misinterpreted the comments of a third juror, and believed that Elias had jokingly stated to that third juror, "what will it take to win your vote." Because these two jurors believed that Elias was joking when he made his comments, they did not suspect that Elias was tampering with the third juror. Accordingly, these two jurors were not biased against Elias. Finally, while the two jurors' misinterpretation of the comments of a third juror might constitute extrinsic evidence, there is no reasonable possibility that this extrinsic evidence could have affected the verdict.

For these reasons, the motion for new trial will be denied. The findings of fact and conclusions of law that support that decision are set out below. Elias's motion to dismiss for lack of jurisdiction remains pending and will be resolved by the Court promptly.

FINDINGS OF FACT

1. On June 26, 1998, a grand jury indicted defendant Elias on five counts of making false statements to the Government, improperly handling hazardous waste, and endangering his employees by exposing them to that waste.

2. A jury was impaneled on April 15, 1999, to try the case.

3. The trial lasted about three weeks, with both sides resting on May 6, 1999.

4. Sometime during the middle part of the trial, as juror Janet Scott passed by Elias in the parking lot of the Federal Courthouse on the way back from a lunch recess, Elias said hello – or made a similar type of brief greeting/acknowledgment – to juror Scott.[1]

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[1] The Court bases this Finding of Fact on the testimony of juror Scott concerning the content of the conversation. It is true, as will be discussed below, that foreperson Greenlee and juror Burkhart both testified that juror Scott said that Elias had done more than just greet her – that he had in fact asked what it would take to win or turn her vote. But juror Scott denies that Elias said anything beyond a brief greeting. The Court finds juror Scott very credible on this point. The Court finds that it is more likely than not that Elias simply greeted Scott in the parking lot, that Scott related that greeting to her fellow jurors, and that foreperson Greenlee and juror Burkhart misinterpreted

5. Elias said nothing to Scott beyond this brief greeting or acknowledgment. Specifically, Elias did not ask Scott "what would it take to win your vote" or anything similar that would suggest, either in jest or seriously, that Elias was attempting to influence Scott's vote as a juror.

6. Juror Scott did not respond, and proceeded into the Federal Courthouse where a Court Security Officer asked her about her contact with Elias in the parking lot. Elias responded that she had said nothing.[2]

7. Juror Scott then proceeded to the jury room where other jurors had assembled, waiting to resume the trial.

8. Juror Scott related to her fellow jurors (1) that Elias had briefly greeted her in the parking lot, and (2) that the Court Security Officer had questioned her about the greeting when she entered the Federal Courthouse.[3]

Scott's remarks. The Court will discuss this in more detail in its Findings below.

[2] The Court bases this Finding of Fact on the testimony of jurors Betty Conley and Joyce Barrus. Both of these jurors testified that juror Scott had told them that when Scott entered the Courthouse after her encounter with Elias, a Court Security Officer asked Scott if Elias had said anything to her, and Scott responded that she had not said anything. The Court heard no testimony from the Court Security Officer, and juror Scott did not remember whether any such exchange with the Officer took place.

[3] The Court bases this Finding of Fact on the testimony of Joyce Barrus, who testified that Scott told her fellow jurors that Elias had "spoken to her; just asked her how the day was or something like that. . . . It was just like a greeting." *See Transcript of January 7, 1999 Hearing*, at 126-27. Barrus also testified that Scott told her fellow jurors that after her encounter with Elias,

9. Foreperson Boyd Greenlee misinterpreted Scott's comments to mean that Elias had asked Scott what it would take to "win" or "turn" her vote.

10. Juror Michael Burkhart misinterpreted Scott's comments to mean that Elias had asked Scott "what does a guy have to do to get out of this."[4]

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as she walked into the Courthouse, the Court Security Officers "asked her what she was talking about or something; they had seen her – the two of them [Elias and Scott] speaking." *Id.* at 127. Juror Betty Conley corroborated Barrus's testimony that Scott related to her fellow jurors that the Court Security Officers had asked Scott whether she was conversing with Elias in the parking lot. Juror Scott does not recall whether she related these two incidents – the parking lot greeting by Elias and the Court Security Officer's inquiry – to her fellow jurors.

[4] Burkhart's testimony on this issue at the July 2, 1999, hearing was quite different from his testimony at the January 7, 2000, hearing. At the July 2, 1999, hearing, the Court asked Burkhart if he had any knowledge of other jurors having communication with Elias. Burkhart answered that a juror he tentatively identified as Janet Scott "had said that they may have bumped into them [Elias] during the lunch break or something, but as far as conversation-wise or something like that, I don't think so." *See Transcript of July 2, 1999 Hearing* at 53. The Court then stated that "a juror reported that he or she had overheard another juror saying that perhaps Mr. Elias had approached that juror in the parking lot, perhaps coming back from a noon recess, and that a statement may have been made along the lines, perhaps in jest, gosh, what would it take for me to get of [sic] on these charges. Do you recall ever hearing anything like that from another juror?" *Id.* at 56. Burkhart replied, "No, I didn't hear anything like that." *Id.* Burkhart's memory was much different six months later at the January 7, 2000, evidentiary hearing where he testified that he did hear Scott say that Elias had asked her "what does a guy have to do to get out of this?" *See Transcript of January 7, 2000, Hearing* at 82. When asked to explain this change in his testimony, Burkhart

11. Foreperson Greenlee interpreted Scott's comments to mean that Elias had made his comments to Scott in a joking manner.

12. Foreperson Greenlee testified that at the time he heard Scott's comments, he was not scared or frightened, and was not distracted.

13. Juror Michael Burkhart interpreted Scott's comments to mean that Elias had made his comments to Scott in a joking manner.

14. Juror Michael Burkhart testified that at the time he heard Scott's comments, he was not scared or frightened, and was not distracted.

15. On May 7, 1999, juror Scott, the last alternate juror remaining, was dismissed, and the remaining jurors, including Greenlee and Burkhart, began deliberations at about noon.

16. The jury foreperson was Boyd Greenlee.

17. On May 7, 1999, at about 6:30 p.m., the jury rendered a verdict of guilty on four counts of the Indictment.

18. On June 16, 1999, Government prosecutors conducted a telephone conference with jury foreperson Boyd Greenlee to discuss the trial. The conference was initiated by Government counsel to obtain a critique of their performance during trial.

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replied, "I don't remember not recalling it. I don't know. I was pretty nervous when I came down here the last time." *Id.* at 102. Burkhart was nervous at the July 2, 1999, hearing. He had been called in cold, having no idea what he would be asked to recall. It appears that in the intervening six months between July 2nd and January 7th, his memory was refreshed. The Court finds Burkhart to be credible, and finds that his lack of recall on July 2nd was due to his nervousness, and that his testimony on January 7th is credible.

19. During that conference, Greenlee told the prosecutors that during the trial, he had heard from another juror that Elias had approached that juror and asked her "what it would take to buy her off."

20. The prosecutors immediately informed the Court of Greenlee's statements.

21. On July 2, 1999, the Court conducted an evidentiary hearing.

22. At that hearing, which occurred in the Court's chambers, each of the available jurors was called one at a time, placed under oath, and questioned by the Court. Three of the jurors were unavailable and hence not questioned at that time.

23. Counsel were not permitted to ask question, but they could relay questions to the Court, who would then ask the questions.

24. The questioning at the July 2, 1999, hearing was very limited in scope, and, as already noted, three jurors were absent. This convinced the Court to hold a more complete and extensive hearing.

25. The Court set that hearing for January 7, 2000, and directed that all jurors, including alternates, be subpoenaed to testify. In addition, the Court allowed the parties to subpoena any witness upon approval by the Court.

26. One juror, Carol Merrell, had a schedule conflict, and so the Court took her testimony on January 3, 2000.

27. The Court took testimony from the remaining jurors on January 7, 2000. Specifically, the Court took testimony on January 7, 2000, from jurors Betty Conley, Scott Carpenter, David Martinez, Beth Smith, Martha Browning, Michael Burkhart, Joyce Barrus, Janet

Webb, Ryan Elison, Diane Murray, Janet Ball, Boyd Greenlee, and Janet Scott.

28. At the hearings on January 3 and 7, 2000, the Court took the jurors' testimony in open Court. Each juror was questioned individually, while the other jurors were excluded from the Courtroom. All jurors were under a continuing admonition from the Court, repeated on the morning prior to the hearings, that they were not to discuss the case among themselves or with anyone else. The questioning was done by counsel and supplemented when necessary by the Court. The Government proceeded first, followed by the defense, with the Government permitted to ask a final round of rebuttal questions.

29. At that hearing, in addition to the testimony on which the above findings are based, foreperson Greenlee testified that on November 9, 1983, he was charged with a driving under the influence offense to which he pleaded guilty.

30. On the jury questionnaire that Greenlee had filled out prior to the voir dire in this case, he circled the answer "no" to the question "[h]ave you ever been charged with a crime?"

31. During voir dire in this case, the Court asked whether any of the jurors had been charged or convicted of a serious misdemeanor like a DUI. While other jurors responded affirmatively and revealed their DUI convictions, Greenlee failed to do so.

32. Greenlee explained that his failure to reveal his DUI was due to his belief that his record had been expunged of that charge, and that he was not trying to mislead the Court in any way.

33. The Court finds Greenlee's explanation credible.

34. The Court then granted counsel additional time to file briefing, and the final briefs were filed January 19, 2000.

CONCLUSIONS OF LAW

35. The Sixth Amendment guarantees that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury."

36. That constitutional right is violated in cases of actual or suspected jury tampering. *See United States v. Dutkel*, 192 F.3d 893, 895 (9th Cir. 1999).

37. Tampering is defined in *Dutkel* as "an effort to influence the jury's verdict by threatening or offering inducements to one or more of the jurors." *Id.* at 895.

38. *Dutkel* equated actual tampering with suspected tampering because in both cases, "jurors will no doubt resent a defendant they believe has made an improper approach to them." *Id.* at 897.

39. Even erroneous assumptions by a juror that a defendant is tampering with other jurors can be prejudicial: "Assumptions regarding such matters can affect a juror's behavior as much as actual knowledge of the facts. Indeed, erroneous assumptions can under certain circumstances be even more prejudicial than knowledge of the facts." *Owen v. Duckworth*, 727 F.2d 643, 647 (7th Cir. 1984).

40. Under *Dutkel*, the Court must resolve two threshold issues: (1) Did any actual tampering occur?; (2) If no actual tampering occurred, did any of the jurors erroneously suspect that Elias tampered with the jury?

41. The Court finds that no actual tampering occurred as that term is defined in *Dutkel*. At most, Elias stated a

greeting to juror Scott, and made no further comment to her.

42. The Court also finds that no juror suspected that Elias tampered with any juror. Jurors Greenlee and Burkhart interpreted Scott's statements as meaning that Elias was joking. Greenlee and Burkhart testified that they were not frightened, scared, or distracted at the time they heard Scott's comments. The testimony of the other jurors indicates that the predeliberation statements of Greenlee and Scott did not give any indication that they were distracted or frightened in any way.[5] The only jurors who remember Scott saying anything at all – jurors Greenlee, Burkhart, Barrus, and Conley – all testified that Scott's comments were never discussed again. The comments were so insignificant to Burkhart that he did not recall them at the July 2, 1999, hearing.

43. Thus, no juror actually suspected that Elias had made "an effort to influence the jury's verdict by threatening or offering inducements to one or more of the jurors." *Dutkel*, 192 F.3d at 895. And in the language of *Owen*, no juror had a erroneous assumption that Elias was tampering with another juror.

44. Jurors are competent witnesses to testify about tampering under Rule of Evidence 606(b) because tampering constitutes an "outside influence," an express exception to the Rule's general proscription against inquiring into the jury's deliberative process.

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[5] *Dutkel* states that under Rule 606(b), "the court may not inquire into any juror's mental processes, but rather must *focus on conduct.*" *Dutkel*, 192 F.3d at 899 (emphasis added). The Court here focuses on conduct, not mental processes connected with the deliberative process.

45. Jurors are likewise competent under Rule 606(b)'s "outside influence" exception to testify whether any alleged tampering statements were made seriously or in jest. *See, e.g., Remmer v. United States*, 350 U.S. 377 (1956) (considering evidence in "suspected" tampering case that a juror was "disturbed and troubled" by an approach made by a third party that the juror suspected was done at the behest of the defendant);[6] *United States v. Dutkel*, 192 F.3d 893, 898 (9th Cir. 1999) (considering testimony in a tampering case from jurors that a fellow juror was "distracted and expressed fear about his family."); *see generally, United States v. Angulo*, 4 F.3d 843, 848 (9th Cir. 1993) (in a case not discussing Rule 606(b), the Circuit found "particularly instructive" a case requiring a new trial because some jurors testified they were "frightened" by an improper contact, and cited with approval another case denying a new trial where jurors viewed the contact as a "harmless prank.").[7]

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[6] While *Remmer* was decided before Rule 606(b) was in effect, the common law proscriptions against a juror's testimony, in effect during *Remmer*, were very similar to Rule 606(b). *See* 27 Wright & Gold, *Federal Practice and Procedure*, § 6071 (1990). The Court considers *Remmer* a "suspected" tampering case because the juror in *Remmer* was approached by a third-party, not the defendant, in a manner that would raise a suspicion that the third-party was acting at the behest of the defendant in trying to influence jurors.

[7] The testimony regarding jesting was fixed as of the time Greenlee and Burkhart heard Scott's comments. This was a date many days prior to deliberations. The Court did not consider any testimony regarding what effect Scott's comments had on any juror's deliberations, as such testimony would be clearly barred by Rule 606(b). The Court only considered testimony regarding what was said and the context in which the conversation occurred; that is, the time, place, location, and tone (serious or jesting) of the comments as understood by the listeners at the time they heard the comments.

46. Assuming that the Government had the burden of proof of dispelling a presumption of prejudice under *Dutkel*, the Government has carried that burden.

47. A closely related issue to the "suspected" tampering issue is the juror bias issue.

48. The existence of juror bias violates a defendant's Sixth Amendment right to a fair and impartial jury if it results in the denial of a fair trial. *See Bayramoglu v. Estelle*, 806 F.2d 880, 888 (9th Cir. 1986).

49. "The presence of a biased juror cannot be harmless; the error requires a new trial without a showing of actual prejudice." *Dyer v. Calderon*, 151 F.3d 970, 973, n. 2 (9th Cir. 1998) (en banc), *cert denied*, 119 S.Ct. 575 (1998).

50. The defendant has the burden of showing actual or implied bias. *See United States v. Hanley*, 190 F.3d 1017, 1030 (9th Cir. 1999).

51. Implied bias is reserved for the "extraordinary" or "rare" case. *Dyer*, 151 F.3d at 981, 984.

52. "If only one juror was unduly biased or improperly influenced, [the defendant] was deprived of his Sixth Amendment right to an impartial panel." *Dickson v. Sullivan*, 849 F.2d 403, 408 (9th Cir. 1988).

53. The Court finds that Elias has not carried his burden of showing that any juror was biased against him. Greenlee and Burkhart interpreted Scott's comments to mean that Elias was joking. Thus, they did not think that Elias was attempting to influence Scott's vote as a juror.

54. Elias asserts that "Greenlee created out of whole cloth a belief that the defendant tried to bribe a juror," and concludes that "Greenlee must therefore be biased against Mr. Elias." *See Defense Reply Brief* at

2. But Burkhart heard almost the same thing, making it very unlikely that Greenlee created this scenario "out of whole cloth." It is much more likely that Greenlee and Burkhart misinterpreted Scott's comments, and did not internally foment their beliefs out of a bias against Elias. And as explained above, neither Greenlee nor Burkhart believed that Elias tried to bribe Scott – they both thought Elias was joking.

55. In addition, Greenlee's failure to reveal a single DUI – over 15 years old at the time of voir dire – does not bring this case anywhere near *Dyer*. In *Dyer*, the Circuit was faced with a juror who had lied repeatedly in a blatant attempt to be chosen to serve on the jury being selected. The Circuit found her biased, and analyzed the case as follows: "Few voir dires are impeccable, and most irregularities can be shrugged off as immaterial to the fairness of the trial. But the magnitude of [the juror's] lies and her remarkable display of insouciance – her expressed feeling that only she would decide what matters – fatally undermine our confidence in her ability to fairly decide [defendant's] fate. The facts here add up to that rare case where we must presume juror bias." *Id.* at 984. Greenlee's failure to reveal a 15 year-old DUI does not make this a "rare case where [the Court] must presume juror bias," *id.*, especially in light of Greenlee's credible explanation that he thought his record was expunged and was not trying to mislead the Court.

56. Elias asserts that this is an extrinsic evidence case governed by *Dickson*.

57. Under *Dickson*, "a defendant is entitled to a new trial when the jury obtains or uses evidence that has not been introduced during trial if there is a reasonable possibility that the extrinsic material could have

affected the verdict." *Dickson*, 849 F.2d at 405 (internal quotations omitted). Elias asserts that "[t]he extrinsic material involved in this case is the perceived belief that the defendant asked a juror 'what will it take to buy your vote?" *See Defendant's Brief* at 9.

58. *Dickson* goes on to hold that the inquiry is objective in nature: "[A] trial judge should not investigate the subjective effects of any [extrinsic evidence] upon the jurors. Rather, the trial court's factual inquiry is limited to determining the extent, if at all, to which the jurors saw or discussed the extrinsic evidence." *Id.* at 406.

59. As Elias points out, "*Dickson* did not even involve Rule 606," but was based instead on the Sixth Amendment. *See Defendant's Brief* at 10.

60. The trial court is allowed by *Dickson* to inquire into "the nature of the extraneous information," and "how" the "material was actually received." *Id.* at 406. In other words, the Court may inquire into both the content of the communication and the context in which it was received: What words were spoken and how were they spoken? Inquiry into this area does not intrude into the subjective effect of the words upon the juror's deliberations; it merely gives the Court the full picture of the "nature" of the extrinsic evidence. *See United States v. Caporale*, 806 F.2d 1487, 1503 (11th Cir. 1986) (finding no prejudice when juror testified that extrinsic comments were made "in a joking context.").

61. Thus, the Court finds that *Dickson* does not prohibit the Court from inquiring into whether any extrinsic statements were made in a joking or serious manner.

62. This does not automatically render nonprejudicial any extrinsic comment that was made in a joking

manner. As Elias points out, "[e]ven the words, 'I don't want to take a bribe and will not take one' said with a wink and a smile might well be interpreted to mean exactly the opposite." *See Defendant's Brief* at 12 (citing *United States v. Iaconetti*, 406 F.Supp. 554, 559 (E.D.N.Y. 1976)).

63. Nevertheless, the Court finds that in the circumstances of this case, there is no reasonable possibility that Greenlee's and Burkhart's misunderstanding of Scott's comments could have affected their deliberations. Greenlee and Burkhart interpreted Scott to mean that Elias was joking when he said "what will it take to win your vote," and it was never discussed again. Greenlee and Burkhart were not distracted or unable to concentrate on the evidence. Other jurors saw no evidence in the pre-deliberation conduct of Greenlee and Burkhart that they were frightened or distracted. For these reasons, the Court finds that *Dickson* does not mandate a new trial in this case.

64. The Motion for New Trial will therefore be denied.

ORDER

In accordance with the Findings of Fact and Conclusions of Law set forth above,

NOW THEREFORE IT IS HEREBY ORDERED, that the motion for new trial (docket no.206) is hereby DENIED.

Dated this 25th day of January, 2000.

/s/ B. Lynn Winmill
B. LYNN WINMILL
CHIEF JUDGE UNITED STATES
DISTRICT COURT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ALLEN ELIAS, Defendants-Appellant.	No. 00-30145 D.C. No. CR-98-00070-BLW ORDER (Filed Jan. 4, 2002)

Before: WALLACE, HALL, and T.G. NELSON, Circuit Judges.

The panel has voted to deny Appellant's petition for rehearing. Judge Nelson voted to deny the petition for rehearing en banc and Judge Wallace and Judge Hall so recommend.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are denied.

42 USC Sec. 6926

TITLE 42 – THE PUBLIC HEALTH AND WELFARE
CHAPTER 82 – SOLID WASTE DISPOSAL
SUBCHAPTER III – HAZARDOUS WASTE MANAGEMENT

Sec. 6926. Authorized State hazardous waste programs

(a) Federal guidelines

Not later than eighteen months after October 21, 1976, the Administrator, after consultation with State authorities, shall promulgate guidelines to assist States in the Development of State hazardous waste programs.

(b) Authorization of State program

Any State which seeks to administer and enforce a hazardous waste program pursuant to this subchapter may develop and, after notice and opportunity for public hearing, submit to the Administrator an application, in such form as he shall require, for authorization of such program. Within ninety days following submission of an application under this subsection, the Administrator shall issue a notice as to whether or not he expects such program to be authorized, and within ninety days following such notice (and after opportunity for public hearing) he shall publish his findings as to whether or not the conditions listed in items (1), (2), and (3) below have been met. Such State is authorized to carry out such program in lieu of the Federal program under this subchapter in such State and to issue and enforce permits for the storage, treatment, or disposal of hazardous waste (and to

enforce permits deemed to have been issued under section 6935(d)(1)[1] of this title) unless, within ninety days following submission of the application the Administrator notifies such State that such program may not be authorized and, within ninety days following such notice and after opportunity for public hearing, he finds that (1) such State program is not equivalent to the Federal program under this subchapter, (2) such program is not consistent with the Federal or State programs applicable in other States, or (3) such program does not provide adequate enforcement of compliance with the requirements of this subchapter. In authorizing a State program, the Administrator may base his findings on the Federal program in effect one year prior to submission of a State's application or in effect on January 26, 1983, whichever is later.

(c) Interim authorization

(1) Any State which has in existence a hazardous waste program pursuant to State law before the date ninety days after the date of promulgation of regulations under sections 6922, 6923, 6924, and 6925 of this title, may submit to the Administrator evidence of such existing program and may request a temporary authorization to carry out such program under this subchapter. The Administrator shall, if the evidence submitted shows the existing State program to be substantially equivalent to the Federal program under this subchapter, grant an interim authorization to the State to carry out such program in lieu of the Federal program pursuant to this

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[1] See References in Text note below.

subchapter for a period ending no later than January 31, 1986.

(2) The Administrator shall, by rule, establish a date for the expiration of interim authorization under this subsection.

(3) Pending interim or final authorization of a State program for any State which reflects the amendments made by the Hazardous and Solid Waste Amendments of 1984, the State may enter agreement with the Administrator under which the State may assist in the administration of the requirements and prohibitions which take effect pursuant to such Amendments.

(4) In the case of a State permit program for any State which is authorized under subsection (b) of this section or under this subsection, until such program is amended to reflect the amendments made by the Hazardous and Solid Waste Amendments of 1984 and such program amendments receive interim or final authorization, the Administrator shall have the authority in such State to issue or deny permits or those portions of permits affected by the requirements and prohibitions established by the Hazardous and Solid Waste Amendments of 1984. The Administrator shall coordinate with States the procedures for issuing such permits.

(d) Effect of State permit

Any action taken by a State under a hazardous waste program authorized under this section shall have the same force and effect as action taken by the Administrator under this subchapter.

(e) Withdrawal of authorization

Whenever the Administrator determines after public hearing that a State is not administering and enforcing a program authorized under this section in accordance with requirements of this section, he shall so notify the State and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days, the Administrator shall withdraw authorization of such program and establish a Federal program pursuant to this subchapter. The Administrator shall not withdraw authorization of any such program unless he shall first have notified the State, and made public, in writing, the reasons for such withdrawal.

(f) Availability of information

No State program may be authorized by the Administrator under this section unless –

(1) such program provides for the public availability of information obtained by the State regarding facilities and sites for the treatment, storage, and disposal of hazardous waste; and

(2) such information is available to the public in substantially the same manner, and to the same degree, as would be the case if the Administrator was carrying out the provisions of this subchapter in such State.

(g) Amendments made by 1984 act

(1) Any requirement or prohibition which is applicable to the generation, transportation, treatment, storage, or disposal of hazardous waste and which is

imposed under this subchapter pursuant to the amendments made by the Hazardous and Solid Waste Amendments of 1984 shall take effect in each State having an interim or finally authorized State program on the same date as such requirement takes effect in other States. The Administrator shall carry out such requirement directly in each such State unless the State program is finally authorized (or is granted interim authorization as provided in paragraph (2)) with respect to such requirement.

(2) Any State which, before November 8, 1984, has an existing hazardous waste program which has been granted interim or final authorization under this section may submit to the Administrator evidence that such existing program contains (or has been amended to include) any requirement which is substantially equivalent to a requirement referred to in paragraph (1) and may request interim authorization to carry out that requirement under this subchapter. The Administrator shall, if the evidence submitted shows the State requirement to be substantially equivalent to the requirement referred to in paragraph (1), grant an interim authorization to the State to carry out such requirement in lieu of direct administration in the State by the Administrator of such requirement.

(h) State programs for used oil

In the case of used oil which is not listed or identified under this subchapter as a hazardous waste but which is regulated under section 6935 of this title, the provisions of this section regarding State programs shall apply in the same manner and to the same extent as such provisions apply to hazardous waste identified or listed under this subchapter.

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42 USC Sec. 6928

TITLE 42 - THE PUBLIC HEALTH AND WELFARE
CHAPTER 82 - SOLID WASTE DISPOSAL
SUBCHAPTER III - HAZARDOUS WASTE MANAGEMENT

Sec. 6928. Federal enforcement

(a) Compliance orders

(1) Except as provided in paragraph (2), whenever on the basis of any information the Administrator determines that any person has violated or is in violation of any requirement of this subchapter, the Administrator may issue an order assessing a civil penalty for any past or current violation, requiring compliance immediately or within a specified time period, or both, or the Administrator may commence a civil action in the United States district court in the district in which the violation occurred for appropriate relief, including a temporary or permanent injunction.

(2) In the case of a violation of any requirement of this subchapter where such violation occurs in a State which authorized to carry out a hazardous waste program under section 6926 of this title, the Administrator shall give notice to the State in which such violation has occurred prior to issuing an order or commencing a civil action under this section.

(3) Any order issued pursuant to this subsection may include a suspension or revocation of any permit issued by the Administrator or a State under this subchapter and shall state with reasonable specificity the nature of the violation. Any penalty assessed in the order

shall not exceed $25,000 per day of noncompliance for each violation of a requirement of this subchapter. In assessing such a penalty, the Administrator shall take into account the seriousness of the violation and any good faith efforts to comply with applicable requirements.

(b) Public hearing

Any order issued under this section shall become final unless, no later than thirty days after the order is served, the person or persons named therein request a public hearing. Upon such request the Administrator shall promptly conduct a public hearing. In connection with any proceeding under this section the Administrator may issue subpenas [sic] for the attendance and testimony of witnesses and the production of relevant papers, books, and documents, and may promulgate rules for discovery procedures.

(c) Violation of compliance orders

If a violator fails to take corrective action within the time specified in a compliance order, the Administrator may assess a civil penalty of not more than $25,000 for each day of continued noncompliance with the order and the Administrator may suspend or revoke any permit issued to the violator (whether issued by the Administrator or the State).

(d) Criminal penalties

Any person who –

(1) knowingly transports or causes to be transported any hazardous waste identified or listed under this subchapter to a facility which does not have a permit under this subchapter, or pursuant to title I of the Marine

Protection, Research, and Sanctuaries Act (86 Stat. 1052) (33 U.S.C. 1411 et seq.),

(2) knowingly treats, stores, or disposes of any hazardous waste identified or listed under this subchapter –

(A) without a permit under this subchapter or pursuant to title I of the Marine Protection, Research, and Sanctuaries Act (86 Stat. 1052) (33 U.S.C. 1411 et seq.); or

(B) in knowing violation of any material condition or requirement of such permit; or

(C) in knowing violation of any material condition or requirement of any applicable interim status regulations or standards;

(3) knowingly omits material information or makes any false material statement or representation in any application, label, manifest, record, report, permit, or other document filed, maintained, or used for purposes of compliance with regulations promulgated by the Administrator (or by a State in the case of an authorized State program) under this subchapter;

(4) knowingly generates, stores, treats, transports, disposes of, exports, or otherwise handles any hazardous waste or any used oil not identified or listed as a hazardous waste under this subchapter (whether such activity took place before or takes place after November 8, 1984) and who knowingly destroys, alters, conceals, or fails to file any record, application, manifest, report, or other document required to be maintained or filed for purposes of compliance with regulations promulgated by the Administrator (or by a State in the case of an authorized State program) under this subchapter;

(5) knowingly transports without a manifest, or causes to be transported without a manifest, any hazardous waste or any used oil not identified or listed as a hazardous waste under this subchapter required by regulations promulgated under this subchapter (or by a State in the case of a State program authorized under this subchapter) to be accompanied by a manifest;

(6) knowingly exports a hazardous waste identified or listed under this subchapter (A) without the consent of the receiving country or, (B) where there exists an international agreement between the United States and the government of the receiving country establishing notice, export, and enforcement procedures for the transportation, treatment, storage, and disposal of hazardous wastes, in a manner which is not in conformance with such agreement; or

(7) knowingly stores, treats, transports, or causes to be transported, disposes of, or otherwise handles any used oil not identified or listed as a hazardous waste under this subchapter -

> (A) in knowing violation of any material condition or requirement of a permit under this subchapter; or
>
> (B) in knowing violation of any material condition or requirement of any applicable regulations or standards under this chapter;

shall, upon conviction, be subject to a fine of not more than $50,000 for each day of violation, or imprisonment not to exceed two years (five years in the case of a violation of paragraph (1) or (2)), or both. If the conviction is for a violation committed after a first conviction of

such person under this paragraph, the maximum punishment under the respective paragraph shall be doubled with respect to both fine and imprisonment.

(e) Knowing endangerment

Any person who knowingly transports, treats, stores, disposes of, or exports any hazardous waste identified or listed under this subchapter or used oil not identified or listed as a hazardous waste under this subchapter in violation of paragraph (1), (2), (3), (4), (5), (6), or (7) of subsection (d) of this section who knows at that time that he thereby places another person in imminent danger of death or serious bodily injury, shall, upon conviction, be subject to a fine of not more than $250,000 or imprisonment for not more than fiffeen years, or both. A defendant that is an organization shall, upon conviction of violating this subsection, be subject to a fine of not more than $1,000,000.

(f) Special rules

For the purposes of subsection (e) of this section –

(1) A person's state of mind is knowing with respect to –

(A) his conduct, if he is aware of the nature of his conduct;

(B) an existing circumstance, if he is aware or believes that the circumstance exists; or

(C) a result of his conduct, if he is aware or believes that his conduct is substantially certain to cause danger of death or serious bodily injury.

(2) In determining whether a defendant who is a natural person knew that his conduct placed another person in imminent danger of death or serious bodily injury –

(A) the person is responsible only for actual awareness or actual belief that he possessed; and

(B) knowledge possessed by a person other than the defendant but not by the defendant himself may not be attributed to the defendant;

Provided, That in proving the defendant's possession of actual knowledge, circumstantial evidence may be used, including evidence that the defendant took affirmative steps to shield himself from relevant information.

(3) It is an affirmative defense to a prosecution that the conduct charged was consented to by the person endangered and that the danger and conduct charged were reasonably foreseeable hazards of –

(A) an occupation, a business, or a profession; or (B) medical treatment or medical or scientific experimentation conducted by professionally approved methods and such other person had been made aware of the risks involved prior to giving consent.

The defendant may establish an affirmative defense under this subsection by a preponderance of the evidence.

(4) All general defenses, affirmative defenses, and bars to prosecution that may apply with respect to other Federal criminal offenses may apply under subsection (e) of this

section and shall be determined by the courts of the United States according to the principles of common law as they may be interpreted in the light of reason and experience. Concepts of justification and excuse applicable under this section may be developed in the light of reason and experience.

(5) The term "organization" means a legal entity, other than a government, established, or organized for any purpose, and such term includes a corporation, company, association, firm, partnership, joint stock company, foundation, institution, trust, society, union, or any other association of persons.

(6) The term "serious bodily injury" means –

(A) bodily injury which involves a substantial risk of death;

(B) unconsciousness;

(C) extreme physical pain;

(D) protracted and obvious disfigurement; or

(E) protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

(g) Civil penalty

Any person who violates any requirement of this subchapter shall be liable to the United States for a civil penalty in an amount not to exceed $25,000 for each such violation. Each day of such violation shall, for purposes of this subsection, constitute a separate violation.

(h) Interim status corrective action orders

(1) Whenever on the basis of any information the Administrator determines that there is or has been a release of hazardous waste into the environment from a facility authorized to operate under section 6925(e) of this title, the Administrator may issue an order requiring corrective action or such other response measure as he deems necessary to protect human health or the environment or the Administrator may commence a civil action in the United States district court in the district in which the facility is located for appropriate relief, including a temporary or permanent injunction.

(2) Any order issued under this subsection may include a suspension or revocation of authorization to operate under section 6925(e) of this title, shall state with reasonable specificity the nature of the required corrective action or other response measure, and shall specify a time for compliance. If any person named in an order fails to comply with the order, the Administrator may assess, and such person shall be liable to the United States for, a civil penalty in an amount not to exceed $25,000 for each day of noncompliance with the order.

40 C.F.R. § 260.10

CODE OF FEDERAL REGULATIONS
TITLE 40 – PROTECTION OF ENVIRONMENT
CHAPTER I – ENVIRONMENTAL PROTECTION AGENCY
SUBCHAPTER I – SOLID WASTES
PART 260 – HAZARDOUS WASTE MANAGEMENT SYSTEM:
GENERAL SUBPART B – DEFINITIONS
Current through March 19, 2002; 67 FR 12824

§ 260.10 Definitions.

* * *

Representative sample means a sample of a universe or whole (e.g., waste pile, lagoon, ground water) which can be expected to exhibit the average properties of the universe or whole.

* * *

40 CFR 261.23
TITLE 40 – PROTECTION OF ENVIRONMENT AGENCY (CONTINUED)

PART 261 – IDENTIFICATION AND LISTING OF HAZARDOUS WASTE – Table of Contents

Subpart C – Characteristics of Hazardous Waste

See. 261.**23** Characteristic of reactivity.

(a) A solid waste exhibits the characteristic of reactivity if a representative sample of the waste has any of the following properties:

(1) It is normally unstable and readily undergoes violent change without detonating.

(2) It reacts violently with water.

(3) It forms potentially explosive mixtures with water.

(4) When mixed with water, it generates toxic gases, vapors or fumes in a quantity sufficient to present a danger to human health or the environment.

(5) It is a cyanide or sulfide bearing waste which, when exposed to pH conditions between 2 and 12.5, can generate toxic gases, vapors or fumes in a quantity sufficient to present a danger to human health or the environment.

(6) It is capable of detonation or explosive reaction if it is subjected to a strong initiating source or if heated under confinement.

(7) It is readily capable of detonation or explosive decomposition or reaction at standard temperature and pressure.

(8) It is a forbidden explosive as defined in 49 CFR 173.51, or a Class A explosive as defined in 49 CFR 173.53 or a Class B explosive as defined in 49 CFR 173.88.

(b) A solid waste that exhibits the characteristic of reactivity has the EPA Hazardous Waste Number of D003.

JURY INSTRUCTION NO. 26

United States v. Elias, United States
District Court Docket No. 4:98CR0070-E-BLW

Instruction 26

In determining whether the defendant knew that his conduct placed another person in imminent danger of death or serious bodily injury, you are instructed that a person's state of mind is knowing with respect to (A) his conduct, if he is aware of the nature of his conduct; (B) an existing circumstance, if he is aware or believes that the circumstance exists; or (C) a result of his conduct, if he is aware or believes that his conduct is substantially certain to cause danger of death or serious bodily injury.

In determining whether the defendant knew that his conduct placed another person in imminent danger of death or serious bodily injury, the defendant is responsible only for actual awareness or actual belief that he possessed, and knowledge possessed by a person other than the defendant but not by the defendant himself may not be attributed to the defendant.

In proving the defendant's possession of actual knowledge, circumstantial evidence may be used.

The government does not need to show that the defendant actually intended to harm or endanger any person.

United States Court of Appeals, Eighth Circuit.

HARMON INDUSTRIES, INC., Appellee,

v.

Carol M. BROWNER, in her official capacity as Administrator of the United States Environmental Protection Agency; United States of America; United States Environmental Protection Agency, Appellants.
Pacific Legal Foundation; Michigan Manufacturers Association; Mississippi Manufacturers Association; Illinois Manufacturers Association; South Carolina Chambers of Commerce; Environmental Federation of Oklahoma; Arkansas State Chamber of Commerce; Associated Industries of Arkansas, Inc.; Wisconsin Manufacturers and Commerce; The Texas Natural Resource Conservation Commission; American Forest & Paper Association; American Iron & Steel Institute; American Petroleum Institute; Chamber of Commerce of the United States; Chemical Manufacturers Association; Corporate Environmental Enforcement Council; Commercial Affairs Committee of the Hazardous Waste Action Coalition; National Association of Manufacturers; National Mining Association; National Petrochemical & Refiners Association; Rubber Manufacturers Association; Utility Solid Waste Activities Group; Washington Legal Foundation; Missouri Chamber of Commerce; Associated Industries of Missouri,
Amici on Behalf of Appellee,

No. 98-3775.

Submitted: April 22, 1999.
Filed: Sept. 16, 1999.
Rehearing and Rehearing En Banc Denied Jan. 1, 2000.

Robert H. Oakley, Washington, DC, Argued (Lois S. Schiffer, Eric G. Hostetler, *David Shilton* and Belinda L. Holmes, on the brief), for Appellants.

Alok Ahuja, Kansas City, MO, Argued (*Terry J. Satterlee*, on the brief), for Appellee.

Before: *BEAM* and *HANSEN*, Circuit Judges, and *MOODY*,[1] District Judge.

HANSEN, Circuit Judge.

Harmon Industries, Inc., (Harmon) filed this action pursuant to the Administrative Procedure Act, 5 U.S.C. § 706 (1994), seeking judicial review of a final decision of the United States Environmental Protection Agency (EPA). The district court[2] granted summary judgment in favor of Harmon and reversed the decision of the EPA. The EPA appeals. We affirm.

I.

FACTS AND PROCEDURAL BACKGROUND

Harmon Industries operates a plant in Grain Valley, Missouri, which it utilizes to assemble circuit boards for railroad control and safety equipment. In November 1987, Harmon's personnel manager discovered that maintenance workers at Harmon routinely discarded volatile solvent residue behind Harmon's Grain Valley plant. This

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[1] The Honorable James M. Moody, United States District Judge for the Eastern District of Arkansas, sitting by designation.

[2] The Honorable Ortrie D. Smith, United States District Judge for the Western District of Missouri.

practice apparently began in 1973 and continued until November 1987. Harmon's management was unaware of its employees' practices until the personnel manager filed his report in November 1987. Following the report, Harmon ceased its disposal activities and voluntarily contacted the Missouri Department of Natural Resources (MDNR). The MDNR investigated and concluded that Harmon's past disposal practices did not pose a threat to either human health or the environment. The MDNR and Harmon created a plan whereby Harmon would clean up the disposal area. Harmon implemented the clean up plan. While Harmon was cooperating with the MDNR, the EPA initiated an administrative enforcement action against Harmon in which the federal agency sought $2,343,706 in penalties. Meanwhile, Harmon and the MDNR continued to establish a voluntary compliance plan. In harmonizing the details of the plan, Harmon asked the MDNR not to impose civil penalties. Harmon based its request in part on the fact that it voluntarily self-reported the environmental violations and cooperated fully with the MDNR.

On March 5, 1993, while the EPA's administrative enforcement action was pending, a Missouri state court judge approved a consent decree entered into by the MDNR and Harmon. In the decree, MDNR acknowledged full accord and satisfaction and released Harmon from any claim for monetary penalties. MDNR based its decision to release Harmon on the fact that the company promptly self-reported its violation and cooperated in all aspects of the investigation. After the filing of the consent decree, Harmon litigated the EPA claim before an administrative law judge (ALJ). The ALJ found that a civil

penalty against Harmon was appropriate in this case. The ALJ rejected the EPA's request for a penalty in excess of $2 million but the ALJ did impose a civil fine of $586,716 against Harmon. A three-person Environmental Appeals Board panel affirmed the ALJ's monetary penalty. Harmon filed a complaint challenging the EPA's decision in federal district court on June 6, 1997. In its August 25, 1998, summary judgment order, the district court found that the EPA's decision to impose civil penalties violated the Resource Conservation and Recovery Act and contravened principles of res judicata. *See Harmon Indus., Inc. v. Browner,* 19 F.Supp.2d 988 (W.D.Mo.1998). The EPA appeals to this court.[3]

II.

DISCUSSION

A. The Permissibility of Overfiling

When reviewing a federal agency's interpretation of a federal statute, a federal court must defer to the agency's interpretation only if it finds that the agency's interpretation is consistent with the plain language of the statute or represents a reasonable interpretation of an ambiguous statute. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 842-45, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). We review de novo a district court's findings and conclusions regarding the correctness of an agency's statutory interpretations. *See Moore v. Custis,* 736 F.2d 1260, 1262 (8th Cir.1984).

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[3] Approximately thirty different organizations filed six amicus curiae briefs in support of Harmon Industries.

The Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6901-6992K (1994), permits states to apply to the EPA for authorization to administer and enforce a hazardous waste program. *See* 42 U.S.C. § 6926(b). If authorization is granted, the state's program then operates "in lieu of" the federal government's hazardous waste program. *Id.* The EPA authorization also allows states to issue and enforce permits for the treatment, storage, and disposal of hazardous wastes. *Id.* "Any action taken by a State under a hazardous waste program authorized under [the RCRA] [has] the same force and effect as action taken by the [EPA] under this subchapter." 42 U.S.C. § 6926(d). Once authorization is granted by the EPA, it cannot be rescinded unless the EPA finds that (1) the state program is not equivalent to the federal program, (2) the state program is not consistent with federal or state programs in other states, or (3) the state program is failing to provide adequate enforcement of compliance in accordance with the requirements of federal law. *See* 42 U.S.C. § 6926(b). Before withdrawing a state's authorization to administer a hazardous waste program, the EPA must hold a public hearing and allow the state a reasonable period of time to correct the perceived deficiency. *See* 42 U.S.C. § 6926(e).

Missouri, like many other states, is authorized to administer and enforce a hazardous waste program pursuant to the RCRA. Despite having authorized a state to act, the EPA frequently files its own enforcement actions against suspected environmental violators even after the commencement of a state-initiated enforcement action. *See* Bryan S. Miller, *Harmonizing RCRA's Enforcement Provisions: RCRA Overfiling in Light of Harmon Industries v.*

Browner, 5 Environmental Law. 585 (1999). The EPA's process of duplicating enforcement actions is known as overfiling. *See id.* The permissibility of overfiling apparently is a question of first impression in the federal circuit courts. *See Harmon,* 19 F.Supp.2d at 995. After examining this apparent issue of first impression, the district court concluded that the plain language of section 6926(b) dictates that the state program operate "in lieu" of the federal program and with the "same force and effect" as EPA action. Accordingly, the district court found that, in this case, the RCRA precludes the EPA from assessing its own penalty against Harmon. *See id.*

The EPA contends that the district court's interpretation runs contrary to the plain language of the RCRA. Specifically, the EPA cites section 6928 of the RCRA, which states that:

> (1) Except as provided in paragraph (2), whenever on the basis of any information the [EPA] determines that any person has violated or is in violation of any requirement of this subchapter, the [EPA] may issue an order assessing a civil penalty for any past or current violation, requiring compliance immediately or within a specified time period, or both, or the [EPA] may commence a civil action in the United States district court in the district in which the violation occurred for appropriate relief, including a temporary or permanent injunction.
>
> (2) In the case of a violation of any requirement of [the RCRA] where such violation occurs in a State which is authorized to carry out a hazardous waste program under section 6926 of this title, the [EPA] shall give notice to the State in which such violation has occurred prior to

> issuing an order or commencing a civil action under this section.

42 U.S.C. § 6928(a)(1) and (2).

The EPA argues that the plain language of section 6928 allows the federal agency to initiate an enforcement action against an environmental violator even in states that have received authorization pursuant to the RCRA. The EPA contends that Harmon and the district court misinterpreted the phrases "in lieu of" and "same force and effect" as contained in the RCRA. According to the EPA, the phrase "in lieu of" refers to which regulations are to be enforced in an authorized state rather than who is responsible for enforcing the regulations. The EPA argues that the phrase "same force and effect" refers only to the effect of state issued permits. The EPA contends that the RCRA, taken as a whole, authorizes either the state or the EPA to enforce the state's regulations, which are in compliance with the regulations of the EPA. The only requirement, according to the EPA, is that the EPA notify the state in writing if it intends to initiate an enforcement action against an alleged violator.

Both parties argue that the plain language of the RCRA supports their interpretation of the statute. We also are ever mindful of the long-established plain language rule of statutory interpretation, *see Walker v. Dilworth*, 2 U.S. (2 Dall.) 257, 259, 1 L.Ed. 372 (1796), as we inquire into the scope of the EPA's enforcement powers under the RCRA. Such an inquiry requires examining the text of the statute as a whole by considering its context, "object, and policy." *Pelofsky v. Wallace*, 102 F.3d 350, 353 (8th Cir.1996).

An examination of the statute as a whole supports the district court's interpretation. The RCRA specifically allows states that have received authorization from the federal government to administer and enforce a program that operates "in lieu of" the EPA's regulatory program. 42 U.S.C. § 6926(b). While the EPA is correct that the "in lieu of" language refers to the program itself, the administration and enforcement of the program are inexorably intertwined.

The RCRA gives authority to the states to create and implement their own hazardous waste program. The plain "in lieu of" language contained in the RCRA reveals a congressional intent for an authorized state program to supplant the federal hazardous waste program in all respects including enforcement. Congressional intent is evinced within the authorization language of section 6926(b) of the RCRA. Specifically, the statute permits the EPA to repeal a state's authorization if the state's program "does not provide adequate enforcement of compliance with the requirements of" the RCRA. *Id.* This language indicates that Congress intended to grant states the primary role of enforcing their own hazardous waste program. Such an indication is not undermined, as the EPA suggests, by the language of section 6928. Again, section 6928(a)(1) allows the EPA to initiate enforcement actions against suspected environmental violators, except as provided in section 6928(a)(2). Section 6928(a)(2) permits the EPA to enforce the hazardous waste laws contained in the RCRA if the agency gives written notice to the state. Section 6928(a)(1) and (2), however, must be interpreted within the context of the entire Act. Harmonizing the section 6928(a)(1) and (2) language that allows

the EPA to bring an enforcement action in certain circumstances with section 6926(b)'s provision that the EPA has the right to withdraw state authorization if the state's enforcement is inadequate manifests a congressional intent to give the EPA a secondary enforcement right in those cases where a state has been authorized to act that is triggered only after state authorization is rescinded or if the state fails to initiate an enforcement action. Rather than serving as an affirmative grant of federal enforcement power as the EPA suggests, we conclude that the notice requirement of section 6928(a)(2) reinforces the primacy of a state's enforcement rights under RCRA. Taken in the context of the statute as a whole, the notice requirement operates as a means to allow a state the first chance opportunity to initiate the statutorily-permitted enforcement action. If the state fails to initiate any action, then the EPA may institute its own action. Thus, the notice requirement is an indicator of the fact that Congress intended to give states, that are authorized to act, the lead role in enforcement under RCRA.

The "same force and effect" language of section 6926(d) provides additional support for the primacy of states' enforcement rights under the RCRA when the EPA has authorized a state to act in lieu of it. The EPA argues that the "same force and effect" language is limited to state permits because the words appear under a heading that reads: "Effect of State Permit." The EPA contends that the "same force and effect" language indicates only that state-issued permits will have the same force and effect as permits issued by the federal government. The EPA claims that the district court was incorrect when it

applied the "same force and effect" language to encompass the statute's enforcement mechanism. We disagree.

Regardless of the title or heading, the plain language of section 6926(d) states that "[a]ny action taken by a State under a hazardous waste program authorized under this section shall have the same force and effect as action taken by the [EPA] under this subchapter." 42 U.S.C. § 6926(d). In this context, the meaning of the text is plain and obvious. "Any action" under this provision broadly applies to any action authorized by the subchapter, and this language is not limited to the issuance of permits. The state authorization provision substitutes state action (not excluding enforcement action) for federal action. It would be incongruous to conclude that the RCRA authorizes states to implement and administer a hazardous waste program "in lieu of" the federal program where only the issuance of permits is accorded the same force and effect as an action taken by the federal government. Contrary to the EPA's assertions, the statute specifically provides that a "[s]tate is authorized to carry out [its hazardous waste program] in lieu of the Federal program . . . and to issue and enforce permits." 42 U.S.C. § 6926(b). Issuance and enforcement are two of the functions authorized as part of the state's hazardous waste enforcement program under the RCRA. Nothing in the statute suggests that the "same force and effect" language is limited to the issuance of permits but not their enforcement. We believe that if Congress had intended such a peculiar result, it would have stated its preference in a clear and unambiguous manner. Absent such an unambiguous directive, we will apply a common sense meaning to the text of the statute and interpret its provisions in a manner

logically consistent with the Act as whole. *See Windsor on the River Assoc., Ltd. v. Balcor Real Estate Fin., Inc.*, 7 F.3d 127, 130 (8th Cir.1993) (requiring courts to give effect to all the words used by Congress); *see also Minnesota Transp. Reg. Bd. v. United States*, 966 F.2d 335, 339 (8th Cir.1992) ("Section and subchapter titles cannot alter the plain meaning of a statute; they can only assist in clarifying ambiguity").

Utilizing a sort of reverse plain language argument, the EPA contends that its approach is logically consistent with the framework of the RCRA. The EPA cites the statute's citizen suit provision for the proposition that limitations on a parties' right to act are expressly stated within the statute itself. *See* 42 U.S.C. § 6972(b)(1)(B). Section 6972(b)(1)(B), provides that "if the [EPA] or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States or a State," then a private citizen suit is not permitted. *Id.* The EPA argues that if Congress had intended to limit the EPA's right to file an enforcement action, it would have expressly stated its intention as it did in the citizen suit context. We find the EPA's argument unpersuasive. Section 6972(b)(1)(B) of the RCRA provides the parameters for private litigation. In the course of providing such parameters, Congress apparently found it necessary to delineate exactly when and how a private citizen may initiate a civil action against an alleged environmental violator. In contrast, section 6926 of the RCRA addresses the interplay between federal and state authorization. Section 6926 also contains express language that establishes the primacy of states' enforcement rights once the EPA has granted a state authorization. The mere fact that

Congress did not choose to employ the exact same language as contained in an unrelated part of the act does not detract from the plain language used in the state authorization section. Again, Congress provided that the state's program should operate in lieu of the federal program and that the state action should operate with the same force and effect as action taken by the EPA. *See* 42 U.S.C. § 6926(b) and (d). We find the language contained in the state authorization section of the Act to be as unambiguous as the citizen suit provision. In fact, we find it revealing that, under the citizen suit provision, Congress chose to forbid a private citizen from acting if the EPA *or* a state was diligently pursuing a civil action. *See* 42 U.S.C. § 6972(b)(1)(B). Utilizing the same reverse plain language argument, one can assume that if Congress intended to allow the federal government and the states to initiate competing enforcement actions, it would have chosen the words "and/or" rather than simply "or." The word "or" indicates that Congress did not contemplate competing enforcement actions between the federal government and the states. Thus, when the EPA has authorized a state program, the plain language of the text indicates that primary enforcement powers are vested in the states. *See* 42 U.S.C. § 6926.

Even assuming some ambiguity exists in the statutory language, the primacy of the states' enforcement rights, once the EPA has authorized a state to act, is illustrated further through the RCRA's legislative history. The United States House of Representatives stated after its hearings that, through the RCRA, it intended to vest primary enforcement authority in the states. *See* H.R.Rep. 1491, 94th Cong., 2nd Sess. 24, *reprinted in* 1976

U.S.C.C.A.N. 6262 ("It is the Committee's intention that the States are to have primary enforcement authority and if at any time a State wishes to take over the hazardous waste program it is permitted to do so, provided that the State laws meet the Federal minimum requirements for both administering and enforcing the law"). The House Report states that although the "legislation permits the states to take the lead in the enforcement of the hazardous wastes [sic] laws [,] . . . the Administrator [of the EPA] is not prohibited from acting in those cases where the state fails to act, or from withdrawing approval of the state hazardous waste plan and implementing the federal hazardous waste program pursuant to . . . this act." 1976 U.S.C.C.A.N. 6269. The House Report also states that the EPA, "after giving the appropriate notice to a state that is authorized to implement the state hazardous waste program, that violations of this Act are occurring and the state [is] failing to take action against such violations, is authorized to take appropriate action against those persons in such state not in compliance with the hazardous waste title." *Id.* at 6270. The House Report thus supports our interpretation of the statute – that the federal government's right to pursue an enforcement action under the RCRA attaches only when a state's authorization is revoked or when a state fails to initiate any enforcement action.

There is no support either in the text of the statute or the legislative history for the proposition that the EPA is allowed to duplicate a state's enforcement authority with its own enforcement action. The EPA argues that the statute and legislative history support its contention that it may initiate an enforcement action if it deems the

state's enforcement action inadequate. The EPA's argument misses the point. Without question, the EPA can initiate an enforcement action if it deems the state's enforcement action inadequate. Before initiating such an action, however, the EPA must allow the state an opportunity to correct its deficiency and the EPA must withdraw its authorization. *See* 42 U.S.C. § 6926(b) and (e). Consistent with the text of the statute and its legislative history, the EPA also may initiate an enforcement action after providing written notice to the state when the authorized state fails to initiate any enforcement action. *See* 42 U.S.C. § 6928(a)(2); 1976 U.S.C.C.A.N. 6270. The EPA may not, however, simply fill the perceived gaps it sees in a state's enforcement action by initiating a second enforcement action without allowing the state an opportunity to correct the deficiency and then withdrawing the state's authorization.[4]

A contrary interpretation would result in two separate enforcement actions. Such an interpretation, as explained above, would derogate the RCRA's plain language and legislative history. Companies that reach an agreement through negotiations with a state authorized by the EPA to act in its place may find the agreement undermined by a later separate enforcement action by the EPA. While, generally speaking, two separate sovereigns can institute two separate enforcement actions, those

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[4] The EPA cites *Wyckoff Co. v. EPA*, 796 F.2d 1197 (9th Cir.1986), for the proposition that federal enforcement is not prohibited even in states authorized under the RCRA. *Wyckoff*, however, is more illustrative of the EPA's authority to act in place of a state enforcement action. *Wyckoff* did not involve overfiling and competing enforcement actions.

actions can cause vastly different and potentially contradictory results. Such a potential schism runs afoul of the principles of comity and federalism so clearly embedded in the text and history of the RCRA. When enacting the RCRA, Congress intended to delegate the primary enforcement of EPA-approved hazardous waste programs to the states. *See* 1976 U.S.C.C.A.N. 6262, 6270. In fact, as we have noted above, the states' enforcement action has the "same force and effect as an action taken by" the EPA. *See* 42 U.S.C. § 6926(d). In EPA authorized states, the EPA's action is an alternative method of enforcement that is permitted to operate only when certain conditions are satisfied. *See* 42 U.S.C. § 6926(b) and (e); 42 U.S.C. § 6928(b). The EPA's interpretation simply is not consistent with the plain language of the statute, its legislative history, or its declared purpose. Hence, it is also an unreasonable interpretation to which we accord no deference. Therefore, we find that the EPA's practice of overfiling, in those states where it has authorized the state to act, oversteps the federal agency's authority under the RCRA.

B. Res Judicata

As an alternative basis to support its grant of summary judgment, the district court concluded that principles of res judicata also bar the EPA's enforcement action by reason of the Missouri state court consent decree. The EPA argues that the state court judgment has no effect on its enforcement action against Harmon because the two actions lack the elements essential for a finding of res judicata. We review de novo a district court's summary

judgment determinations. *See JN Exploration & Prod. v. Western Gas Resources,* 153 F.3d 906, 909 (8th Cir.1998).

Principles of res judicata embodied in the Full Faith and Credit Act, 28 U.S.C. § 1738 (1982), *see also* U.S. Const. art. 4, § 1, require federal courts to give preclusive effect to the judgments of state courts whenever the state court from which the judgment emerged would give such an effect. *See Hickman v. Electronic Keyboarding, Inc.,* 741 F.2d 230, 232 (8th Cir.1984). In this case, we must determine whether Missouri law would give res judicata effect to the consent decree entered between Harmon and the MDNR in Missouri state court.

In Missouri, res judicata requires "(1) [i]dentity of the thing sued for; (2) identity of the cause of action; (3) identity of the persons and parties to the action; and (4) identity of the quality of the person for or against whom the claim is made." *Prentzler v. Schneider,* 411 S.W.2d 135, 138 (Mo.1966) (en banc).

In this case, the four Missouri law res judicata requirements are satisfied. In both the state court action and the EPA administrative enforcement action, the parties sought to enforce a hazardous waste program pursuant to the RCRA. In both the state action and the agency action, the complaints named Harmon as the defendant. In addition, both actions involved the enforcement of regulations based upon identical facts and legal principles. The only dispute is whether the parties are identical.

A party is identical when it is the same party that litigated a prior suit or when a new party is in privity with a party that litigated a prior suit. *See United States v.*

Gurley, 43 F.3d 1188, 1197 (8th Cir.1994), *cert. denied*, 516 U.S. 817, 116 S.Ct. 73, 133 L.Ed.2d 33 (1995). Privity exists when two parties to two separate suits have "a close relationship bordering on near identity." *Id.* (internal quotations omitted); *see also Hickman*, 741 F.2d at 233. As the United States and the State of Missouri are not the same party, we must resolve whether their relationship in the enforcement action is nearly identical.

The statutory language of the RCRA provides the framework for the party identity analysis. Pursuant to 42 U.S.C. § 6926(b), the federal program operates "in lieu of" the state program. Section 6926(d) of the same statute mandates that "[a]ny action taken by a State under a hazardous waste program authorized under this section shall have the same force and effect as action taken by the [EPA] under this subchapter." 42 U.S.C. § 6926(d). As we determined in Part II(A) of this opinion, the plain language of the RCRA permits the State of Missouri to act in lieu of the EPA. When such a situation occurs, Missouri's action has the same force and effect as an action initiated by the EPA. Accordingly, the two parties stand in the same relationship to one another. The EPA argues that it has enforcement interests sufficiently distinct from the interests of the State of Missouri. We explained in *Hickman*, however, that privity under Missouri law is satisfied when the two parties represent the same legal right. *See Hickman*, 741 F.2d at 233. As the district court correctly indicated, privity is not dependent upon the subjective interests of the individual parties. *See Harmon*, 19 F.Supp.2d at 998; *see also Hickman*, 741 F.2d at 233. In this case, the State of Missouri advanced the exact same legal

right under the statute as the EPA did in its administrative action. Accordingly, the identity of the parties requirement is satisfied.

The EPA contends that even if principles of res judicata are satisfied under Missouri law, the doctrine of sovereign immunity precludes applying res judicata to the United States unless the United States was the actual party in the prior lawsuit. Before addressing the merits of the EPA's claim, we note that the EPA did not raise the sovereign immunity defense before the district court. Harmon argues that in failing to raise the issue at the district court level, the EPA has waived its right to assert sovereign immunity on appeal. Sovereign immunity, however, is a jurisdictional threshold matter and it is well-established that questions of subject matter jurisdiction can be raised for the first time on appeal. *See Dewitt Bank & Trust Co. v. United States,* 878 F.2d 246 (8th Cir.1989), *cert. denied,* 494 U.S. 1016, 110 S.Ct. 1318, 108 L.Ed.2d 493 (1990).

Turning to the merits of the EPA's sovereign immunity defense, we conclude that the defense is forestalled by the United States Supreme Court's decision in *Montana v. United States,* 440 U.S. 147, 99 S.Ct. 970, 59 L.Ed.2d 210 (1979). In *Montana,* the Supreme Court held that "one who prosecutes or defends a suit in the name of another to establish and protect his own right is as much bound as he would be if he had been a party to the record." 440 U.S. at 154, 99 S.Ct. 970 (internal quotations and alterations omitted). The Court found in *Montana* that although the United States was not a party to a prior suit, it "had a sufficient laboring oar in the conduct of the state-court litigation to actuate principles of estoppel." *Id.*

at 155, 99 S.Ct. 970.[5] The EPA argues that it had no laboring oar in the State of Missouri's enforcement action. Such an argument ignores the RCRA. Unlike the present case, *Montana* did not involve a statute that authorized the state to proceed "in lieu of" the federal government and "with the same force and effect" as the federal government. In *Montana,* the United States controlled the details of the prior suit directly. In RCRA cases, however, the federal government authorizes the state to act in its place. It cedes its authority to the state pursuant to the authorization plan contained in the statute. *See* 42 U.S.C. § 6926(b). The "laboring oar" is pulled on much earlier in the process. It occurs at the authorization stage when the EPA grants the state permission to enforce the EPA's interests through the state's own hazardous waste program. After authorization, the state "prosecutes" enforcement actions "in lieu of" the federal government and operates as if it were the EPA. *See* 42 U.S.C. § 6926(b) and (d). Hence, pursuant to *Montana,* the United States must be bound by prior judgments involving state action as authorized by the RCRA. *See also United States v. County of Cook, Illinois,* 167 F.3d 381, 389 (7th Cir.1999) (questioning when sovereign immunity to claim preclusion exists); *United States v. ITT Rayonier, Inc.,* 627 F.2d 996, 1002 (9th Cir.1980) (applying res judicata against the EPA). Accordingly, we find that principles of res judicata as defined by Missouri law foreclose the EPA's enforcement action against Harmon.

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[5] *Montana* involved principles of collateral estoppel as opposed to res judicata. 440 U.S. at 154, 99 S.Ct. 970. We do not believe such a distinction is relevant in the context of this case.

C. The Statute of Limitations Defense

Harmon argues that the EPA's enforcement claim is barred by a five-year statute of limitations. *See* 28 U.S.C. § 2462. The district court found that the statute of limitations did not affect this action. Although our decision in this case precludes our need to address this issue and Harmon did not file a cross-appeal, we note that Harmon's statute of limitations claim entirely lacks merit. Harmon continuously polluted from 1973 to 1987. The EPA initiated its enforcement action in 1991. Hence, the EPA's action fell within the five-year statute of limitations. *See Cornerstone Realty, Inc. v. Dresser Rand. Co.*, 993 F.Supp. 107, 114-15 (D.Conn.1998). Accordingly, Harmon's statute of limitations argument fails.

III.

CONCLUSION

For the reasons stated herein, we affirm the judgment of the district court.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

UNITED STATES OF AMERICA, Plaintiff, v. ALLAN ELIAS, Defendant.	Case No. CR-98-070-E-BLW **DEFENDANT'S SUPPLEMENTAL REPLY IN SUPPORT OF MOTION FOR DISMISSAL OF COUNTS I THROUGH III ON VOID FOR VAGUENESS GROUNDS** (Filed DATED this 9th day of March, 1999)

> . . . if a reinstated 1985 guidance is the only guidance available, it will be used as a bright line, and waste passing the test will likely be considered by industry, and I would guess also the courts, to be non-hazardous. Generators

> could clearly make the argument that they have performed and passed the only test EPA has approved and have no better basis for identifying the waste as hazardous. If EPA doesn't know whether (or which) wastes testing below the guidance threshold are hazardous, how can a generator know better what the Agency intended?

January 26, 1999 email from Gregory L. Helms, EPA Hazardous Waste Identification Division, Office of Solid Waste and Emergency Response, to David Bussard, Director, EPA Hazardous Waste Identification Division, Office of Solid Waste and Emergency Response. *See* Exhibit D, attached hereto.

> . . . based on the April 21, 1998 memo from you and Barnes [Johnson] to Diana Love, Director of NEIC withdrawing CN and sulfide reactivity guidance, the withdrawal deleted the . . . test methods in SW 846, Chapter 7 for reactive CN and sulfides. * * * Without the thresholds, even [sic, if] we have total concentrations of CN and sulfides, [EPA's] delisting [branch] has no way to determine whether or not the waste is reactive.

January 21, 1999 email from EPA OSWER "delisting" official Shen-yi Yang to David Bussard, Director, EPA Hazardous Waste Identification Division, Office of Solid Waste and Emergency Response. *See* Exhibit D, attached hereto.

Argument

On March 1, 1999, a few scant days before the then scheduled hearing on Defendant's Motion for Dismissal

of Counts I through III on Void for Vagueness Grounds (hereafter, "Vagueness Motion"), we received certain critical documents in discovery from the government, including the documents quoted from above, documents so critical to our pending Vagueness Motion that we take the unusual step of filing this Supplemental Reply to explain their significance[1] and to urge this Court to agree with EPA's own highest level hazardous waste officials, to find that "if EPA doesn't know whether (or which) wastes testing below the guidance threshold are hazardous, how can a generator know better what the Agency intended," and to find the RCRA reactivity characteristic for reactive cyanide to be so fatally vague as to be impossible of enforcement in this serious federal criminal case.[2]

The documents tardily produced last week show that following the April 1998 withdrawal of the SW-846 published test method by David Bussard, Director of the EPA Hazardous Waste Identification Division, EPA Office of Solid Waste and Emergency Response ("OSWER"), EPA's "delisting" officials (who determine response to petitions

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[1] We note in passing that the government filed several supplemental responses on the eve of last week's hearing and is filing additional materials simultaneously with this Supplemental Reply. We do not take for granted any right to file any supplemental reply, and we respectfully ask this Court to consider the materials we have set forth herein.

[2] Again, we note that our motion to dismiss asserts that the vagueness of the RCRA characteristic, as applied here, precludes enforcement in this criminal case. We do not ask this Court to conclude that the RCRA reactive cyanide characteristic may not be important in other matters, perhaps civil matters, with different facts.

under 40 CFR § 260.22 for delisting of particular industrial waste streams as hazardous wastes), have been in a total quandary concerning how to respond to delisting petitions involving cyanide wastes, now that there is no understandable test method available (the only government pronouncement on the topic applicable to present, as distinguished from 1996, hazardous waste determinations being the vague narrative standard set forth in the RCRA cyanide reactivity characteristic). We have attached copies of the critical documents produced last week as exhibits to this Memorandum. We discuss each in turn below, since the newly received documents themselves argue persuasively that the RCRA cyanide reactivity characteristic is simply too vague to be enforceable in this criminal case. We have already set forth the law relevant to our motion in other briefs.

We note that we have recently become aware that the government has filed an Affidavit of Greg Helms in support of their brief relating to our Vagueness Motion. We find it instructive to compare the language of Mr. Helms' affidavit (in which he claims the "interim test method" included in SW-846 "did not directly or indirectly modify or change the narrative regulatory definition of a RCRA reactive waste" – paragraph 6, Helms' Affidavit) with his own email language sent to his colleagues, quoted above.

Exhibit A: Email Dated January 7, 1998 from EPA OSWER Official Greg Helms to David Bussard, Director of the EPA Hazardous Waste Identification Division, OSWER

This email dated January 7, 1998, from EPA OSWER official Greg Helms to David Bussard, Director of the EPA Hazardous Waste Identification Division, OSWER, indicates that on January 7, 1998, Helms received a call from an attorney involved in this enforcement case. The attached notes of a telephone call show that EPA "ORC Region 10" (Office of Regional Counsel) attorney James Oesterle spoke with OSWER officials on January 9, 1998 about (1) the Evergreen Resources criminal matter, (2) the fact that the samples from the Evergreen Resources tank passed "the recommended CN reactivity test method," and (3) the perceived "shortcomings of the CN reactivity test method." Thus, Mr. Helms' own emails show that he was contacted by an enforcement attorney involved in this criminal case, who actively lobbied EPA's Office of Solid Waste and Emergency Response related to withdrawal of the SW-846 published test method.

Exhibit B: Notes of an EPA Conference Call January 26, 1998

These handwritten notes were generated January 26, 1998, during an EPA conference call involving Joseph Lowry, the government's announced expert witness from EPA relating to cyanide, and EPA NEIC Director Diana

Love.[3] The author made reference to discussion about a Grand Jury proceeding in EPA Region 10 involving EPA attorney James Oesterle, and test results from Evergreen Resources in the range of "1-2 ppm HCN" [results a hundred times under the SW-846 published test method threshold for reactive cyanide]. As evidenced by Defendant's Pretrial Motions Hearing Exhibit 1025, made part of the evidentiary record in the hearing conducted March 5, 1999 (also attached as Exhibit F to our Vagueness Memorandum), Ms. Love formally requested withdrawal of the cyanide reactivity test method on February 18, 1998.

Exhibit C: September 23, 1998 Email to EPA OSWER Official Greg Helms

This page consists of an email from EPA OSWER official Greg Helms to Jennifer Bramlett of SAIC (a government contractor to EPA's OSWER), and the response back from Ms. Bramlett. In his email of September 23, 1998, EPA OSWER official Helms stated that "you found a delisting that specified use of the reactive sulfide/cyanide guidance test method." The responsive email from Jennifer Bramlett of SAIC stated:

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[3] Director of the EPA Denver NEIC laboratory and author of the February 18, 1998 memorandum to David Bussard, Director of the EPA Hazardous Waste Identification Division, OSWER, seeking withdrawal of the published SW-846 cyanide reactivity test method. *See* Defendant's Pretrial Motions Hearing Exhibit 1025, also attached as Exhibit F to our Vagueness Memorandum.

> many conditional delistings in the 40 CFR appear to require total constituent analysis for reactive cyanide or sulfide as a condition at some stage (e.g., initial testing) of the subject delisting. My search of regs current to July 17, 1998 found the following delistings with such a test condition. . . . "

Ms. Bramlett thereafter set out 12 "delistings" (meaning EPA published consent to removal of wastes generated by a particular industrial facility, from consideration as a hazardous waste) where such delisting relied upon chemical analyses for reactive cyanide or sulfide (pursuant to the SW-846 published test method).

Exhibit D: January 1999 Emails from EPA OSWER Official Greg Helms and Responses

This exhibit consists of four pages of related email communications in January, 1999 between officials of the EPA Office of Solid Waste and Emergency Response, all focused on the fact that the EPA officials responsible for considering "delisting" petitions pursuant to 40 CFR § 260.22, following the announced intent to withdraw the SW-846 published cyanide reactivity test method, no longer have the ability to determine what is a reactive cyanide or sulfide waste. These emails clearly establish that high level EPA officials cannot determine what cyanide bearing wastes are hazardous wastes under RCRA, given only the vague narrative standard set forth in 40 CFR § 261.23(a)(5).

The email "thread" in Exhibit D starts with a January 20, 1999 email from the Director of the EPA Hazardous Waste Identification Division, OSWER, David Bussard.

See page 4 of Exhibit D. Mr. Bussard, among other things, summarizes that:

> if someone seeks a delisting for wastes where reactivity is a concern, and they provide data as to why they believe the waste is not reactive, we should take the stance (probably in writing, perhaps in the FR preamble) whether or not we find the kind of information they presented to be convincing or not regarding reactivity. [EPA officials involved in delisting] would clearly like us to be in a position to make some sort of decision (hazardous/not-hazardous) and to at least state that if we judge it to be nonhazardous that they would get considerable deference in application of the reactivity characteristic until such time as we develop more specific guidance or rule text on what "reactivity" means.

EPA delisting official Shen-yi Yang, in his response email dated January 21, 1999, states:

> David [Bussard], as I mentioned to you in my earlier lan [local area network] message, based on the April 21, 1998 memo from you and Barnes [Johnson] to Diana Love, Director of NEIC withdrawing CN and sulfide reactivity guidance, the withdrawal deleted the CN and sulfides thresholds (250 ppm and 500 ppm, respectively) and test methods in SW 846, Chapter 7 for reactive CN and sulfides. The methods SW 9010/9012 for total CN, and 9030 for total sulfides remain effective. **Without the thresholds, even [if] we have total concentrations of CN and sulfides, delisting has no way to determine whether or not the waste is reactive.** [Emphasis added.]

See Exhibit D.

In a related email dated the next day, January 22, 1999, EPA delisting official Shen-yi Yang refers to and quotes from earlier emails from other EPA officials:

> John: **absent a clear bright line as to what is reactive CN and sulfide, there can be no further delisting of reactive wastes**. . . . (Emphasis added.)
>
> Chi: . . . However, for waste containing some cyanides (such as electroplating), it would be difficult for the facility to demonstrate without a legitimate test methodology or for the petition reviewer to make a judgement call.

See Exhibit D. In another email set forth in Exhibit D, dated January 26, 1999, with the subject heading "Delistings and Reactivity," EPA OSWER official Greg Helms makes reference to the series of emails that "made the rounds while I was out last week." Among other things, Helms states:

> I agree with John that we need to formulate a policy framework within which we and industry can make reliable determinations about which sulfide-and cyanide-bearing wastes are reactive haz wastes, and that delistings need to be done in this context. . . .
>
> * * *
>
> I do not necessarily think we cannot do delistings now. . . . [thus making clear that someone within EPA has previously so suggested.] [Comment added.]
>
> * * *
>
> I also continue to strongly oppose any reinstatement of the 1985 guidance as it is written [thus,

clearly establishing that certain EPA officials are seeking such reinstatement.] [Comment added.]

* * *

Despite statements to the contrary we might make, if a reinstated 1985 guidance is the only guidance available, it will be used as a bright line, and waste passing the test will likely be considered by industry, and I would guess also the courts, to be non-hazardous. [Note the difference here between Mr. Helms' Affidavit language and his communications with his peers.] Generators could clearly make the argument that they have performed and passed the only test EPA has approved and have no better basis for identifying the waste as hazardous. If EPA doesn't know whether (or which) wastes testing below the guidance threshold are hazardous, how can a generator know better what the Agency intended? [Comment added.]

Exhibit E: February 2, 1999 Email from EPA OSWER Official Greg Helms and February 8, 1999 Response from EPA Delisting Official Shen-yi Yang

On February 2, 1999, EPA OSWER official Greg Helms wrote: "I am forwarding a request for documents regarding sulfide/cyanide reactivity testing, the 1985 guidance, and its use in enforcement and delisting, among other things." This email, attached to a responsive email with the subject header "Subject: Cyanide Reactivity/Criminal Prosecution," clearly establishes that despite our September 1998 request for production of this information material to our defense, the government prosecution team in this case waited until February 1999

to first communicate our request to the EPA offices from whom we sought documents.

The responsive email, from EPA delisting official Shen-yi Yang concerning "Subject: Cyanide Reactivity/ Criminal Prosecution," is critical to our pending motion to dismiss on vagueness grounds, Mr. Yang states:

> Greg, **Delisting uses and relies on the 1985 reactivity guidance to determine if a waste generated by a particular facility is not hazardous (as to reactivity characteristic) and therefore, can be excluded from the requirements of hazardous waste regulations.** [Emphasis added.] See discussions in pages 6-11 to 6-12 of *Petitions to Delist Hazardous Wastes, A Guidance Manual,* September 1992; and pages 28, 33, and 34 of *Region 6 RCRA Delisting Program Guidance Manual for the Petitioner,* March 1996.
>
> * * * 2. Delisting established testing programs for facilities generating wastes that are conditionally delisted. The testing programs assist the facilities in assessing if their wastes are meeting the delisting criteria to be managed as non-hazardous. These 14 facilities are listed in 40 CFR Appendix IX. In addition to other testing requirements, these waves are required to be sampled and analyzed periodically for total cyanide and total sulfides, and for reactive cyanide and sulfide if the results exceed the thresholds specified in the 1985 reactivity guidance (i.e., 250 ppm for cyanide; 500 ppm for sulfides).

Thus, Mr. Yang indicates that the EPA personnel responsible for considering delisting petitions do not consider the SW-846 published test method to be "optional" as Mr. Helms seeks to establish by his affidavit. Mr. Yang's email

summarizes the 14 delistings he has mentioned, noting as we quote in the chart (prepared for clarity) below:

Facility Listed by Yang	Yang Comments
Envirite of Illinois:	"Testing for reactive cyanide required. No test method specified. (SW-846 Chapter 7.3.3.2 is the only method that is currently available for reactive cyanide)" [the SW-846 published test method].
Envirite of Ohio and Pennsylvania	"Same as 1 above."
Bethlehem Steel Corp., Steelton, Pennsylvania	"Initial testing required for reactive sulfide and cyanide; **SW-846 methods required**." [Emphasis added.]
CF & I Steel Corp., Pueblo, Colorado	"Initial testing required for reactive sulfide and cyanide; **SW-846 methods required**." [Emphasis added.]
Roanoke Electrical Steel Corp., Roanoke, Virginia	"Initial testing required for reactive sulfide and cyanide; **SW-846 methods required**." [Emphasis added.]
USX Steel Corp., USS Division, Southworks Plant, Gary Works, Chicago, Illinois	"Initial testing required for reactive sulfide and cyanide; **SW-846 methods required**." [Emphasis added.]

Exhibit E thus establishes that the EPA delisting branch, that responds to petitions by industry facilities to delist particular hazardous wastes, has (1) historically relied upon the SW-846 published test method for determining reactive cyanide levels, (2) used that published test method to make determinations with respect to whether a material is or is not to be considered hazardous waste, and (3) required multiple regulated parties (including Bethlehem Steel, CF & I Steel Corp., Roanoke Electrical Steel Corp., and USX Steel Corp.) to themselves use the SW-846 published reactive cyanide test method to conduct their own testing.

CONCLUSION

These documents tardily produced last week, in response to our September 1998 *Brady* requests, make clear that we are not the only ones who believe that the narrative standard set forth in the RCRA cyanide reactivity characteristic is too vague to support important decisions; EPA's own delisting officials, as well established in the attached exhibits, believe the same to be true, and there is support within EPA to reinstate the SW-846 published test methods. As EPA OSWER official Helm's private communications make clear, as distinguished from his litigation posturing set forth in his Affidavit, "If EPA doesn't know whether (or which) wastes testing below the guidance threshold are hazardous, how can a generator know better what the Agency intended?" The standard the government wishes to apply in this case is simply too vague to be the basis for a 15 year felony, particularly when the constitutional rule of

lenity is applied here, as it must be. Counts I through III should be dismissed.

DATED this 9th day of March, 1999.

Respectfully Submitted,

NEVIN HERZFELD & BENJAMIN LLP

/s/ Scott McCoy
for David Z. Nevin
Attorneys for
Defendant Allan Elias

DAVIS WRIGHT TREMAINE LLP

/s/ Scott McCoy
for David V. Marshall
Attorneys for
Defendant Allan Elias

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of March, 1999, I caused a true and correct copy of the foregoing document and attached exhibits to be

_ mailed

_ faxed

x hand delivered

_ sent via Federal Express

to: Mr. David Uhlmann, Department of Justice, Environment and Natural Resources Division, ENRD, 601 Pennsylvania Avenue NW, Suite 6101, Washington DC 20004; and to be

_ mailed

_ faxed

x hand delivered

_ sent via Federal Express

to: Mr. George Breitsameter and Ms. Celeste Miller, Assistant United States Attorneys, U.S. Attorney's Office, Box 32, Boise, ID 83707.

/s/ Scott McCoy
for David Z. Nevin

EXHIBIT A

From: GREG HELMS
To: BUSSARD-DAVID
Date: 7 January 1998 3:45pm
Subject: Reactivity-Reply

David –

I am not completely to the bottom line yet. I still need to verify some of the information, especially information on damage case occurrence and relation to waste management. I had a call from one of the attorneys on one of the enforcement cases Lowry referred to, and hope to verify the damage cases that Lowry said were associated with the cases.

The bottom line that Lowry is asserting is that our recommended cyanide reactivity test and guidance is inadequate to evaluate wastes and protect HH&E, and that severe injury to humnas [sic] has resulted from the test and guidance level inadequacies. I cannot yet verify this as the bottom line, but have no contradictory information so far.

>>>DAVID BUSSARD 1/2/98 3:07 PM<<<

I am unlikely to work my way through all the material you sent me.

What is the bottom line?

Notes on CN reactivity testing issue:

Jim Osterly from ORC Region 10 Criminal Enf. Division (206-553-1796) called on 1/9 to discuss the damage cases cited by Joe Lowry in discussing the shortcomings of the CN reactivity test method.

The case on which he is working involved a small fertilizer Mfg, in which one worker was overcome by HCN with resultant severe brain damage.

CN from a CN based silver recovery operation was in an old closed top fuel storage tank which had been installed above ground. Two workers were sent in through a hole cut in the top to clean out the CN through another hole cut in the side of the tank. No respirators were in use. One worker was overcome, another got out in time. Rescue squad cut a larger hole in the side of the tank to get the injured worker out. Medical report on injured worker indicates permanent brain damage resulting from CN induced anoxia.

The waste in the tank had not been evaluated for reactivity prior to the incident.

Subsequent evaluation of the material by Joe Lowry indicated that it did not fail the recommended CN reactivity test method

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EXHIBIT B

Conf. Calls — Dana Lowe

HCN Testing – Joe Lowry
Joe: Grand Jury – In Feb
Region 10
Jim Ostrelye

1-2 ppm – Regional Test results – Evergreen

Joe L. 1-2 ppm HCN – Evergreen

200mg/M^3 in closed System
using evergreen waste in proportionate size flask[?]

Tristate Mint Use

Royal Recovery

½% Sulfide [illegible] Road [illegible] water treat Agent

Joe To Do Expert Report By 2/16

CN & Sulfides
[illegible]

& reg text – protection of workers

– knowledge?

EXHIBIT C

From: Jennifer Bramlett
<jbramlet@lan828.ehsg.saic.com>

To: GREG HELMS
<HELMS.GREG@epamail.epa.gov>

Date: 23 September 1998 7:12pm

Subject: Re: delistings with reactivity test condition

Greg
I apologize for not getting back to you sooner, I was unavailable earlier. Anyway, many conditional delistings in the 40 CFR appear to require total constituent analysis for reactive cyanide or sulfide as a condition at some stage (e.g., initial testing) of the subject delisting. My search of regs current to July 17, 1998 found the following delistings with such a test condition (page number provided is from the 1997 CFR):

Envirites of IL, OH, and PA – item (2), p 91 (waste from non-specific source, Table 1)

Bethlehem Steel Corp. Steelton, PA – items (1)(A) and (2), p 101

Bethlehm [sic] Steel Corp, Johnstown, PA – items (1)(A) and (2), p 102

BF Goodrich Intermediates Co., Calvert City, KY – items (1)(B) and (3), p 103

CF&I Steel Corp, Pueblo CO – items (1)(A) and (2), p 104

Envirites of IL, OH, and PA – item (2), p 108 (waste from specific source, Table 2)

Occidental Chemical Corp, Sheffield, AL – items (1)(A) and (3), p 111

Occidental Chem. Corp., Delaware City, DE – items (1)(A) and (3), pp 112 and 113

Roanoke Electric Co, Roanoke, VA – items (1)(A) and (2), p 116

Tricil Environ. Systems, Hilliard, OH – item (2), p 117

Tricil Environ. Systems, Muskegon, MI – item (2), p 117

USX Steel Corp, Chicago, IL – items (1)(A) and (2), p 118

Greg, please call (703 645 6910 or email right away if you have any questions or need more information – I'm happy to help out.

Jen.

Date: Wed, 23 Sep 1998 09:41:03-0400
From: GREG HELMS
<HELMS.GREG@epamail.epa.gov>

Subject: Revisions to 261.21 and 261.22 – Reply

To: jbramlet@lan828.ehsg.saic.com

Jennifer – In discussing this with Barry he told me that you found a delisting that specified use of the reactive sulfide/cyanide guidance test method. Can you please tell me which delisting this was/is, ASAP Pls.

EXHIBIT D

FROM: GREG HELMS
To: DCCS01.DCCSP02(BRANDES-WILLIAM, BUSSARD-DAVID, JOH . . .
Date: 26 January 1999 8:31 am
Subject: Delistings and Reactivity -Reply -Reply -Reply -Reply

Shen-yi and others who care about CN: John Austin forwarded to me a copy of the series of emails that made the rounds while I was out last week. Having read it, I feel like I want to put in my $0.02 worth.

Regarding CN risk management policy – While in HWIR and many parts of the program we are focused on chronic risks to the general population, and often do not base our decisions on risks to workers, neither of these have been true for sulfde [sic] and cyanide reactivity. The reactivity background document cites several damage cases of worker injury or death resulting from acute exposures to evolved HCN or H2S gas. The 1985 guidance, while fatally flawed technically, clearly presents a policy of considering acute risks to workers, and uses the OSHA worker exposure levels as the air concentration target at which modeling the open-pit mismanagement scenario was directed.

I agree with John that we need to formulate a policy framework within which we and industry can make reliable determinations about which sulfide- and cyanide-bearing wastes are reactive haz wastes, and that delistings need to be done in this context. There are, however, lots of ways of getting there, and I beleive [sic] this is a

topic of sufficient complexity that we will not be able to a priori make a clear, concise statement about these wastes. I do think we need to try to clearly articualte all the relevant concerns as a way of beginning to formulate a statement that goes beyond the policy implications of the 1985 memo and the background document. These include the complexity of the environmental and analytical chemistry, the policy shortcomings of the 1985 guidance (i.e., that no enclosed-space scenarios were considered; we do now have damage incidents that include cyanide wastes in enclosed spaces), and also the need for guidance that does not regulate all waste with any CN.

I do not necessarily think we cannot do delistings now. As Dave's note suggested, even if we do not know clearly all the inforamtion [sic] we would find convincing in finding a waste non-reactive, and therefore eligible for delisting, I think we can tell delisting petitioners our concerns and consider data and arguments they may want to make. While not the msot [sic] satisfactory approach it may be the best we can do now, and the need to consider and decide specific cases may also help us clarify our real concerns and thinking.

I also continue to strongly oppose any reinstatement of the 1985 guidance as it is written. If we need to do something soon, the fundamental calculational and modeling errors in the guidance must be corrected in any reinstated version of the guidance.

Despite statements to the contrary we might make, if a reinstated 1985 guidance is the only guidance available, it will be used as a bright line, and waste passing the test will likely be considered by industry, and I would guess

also the courts, to be non-hazardous. Generators could clearly make the argument that they have performed and passed the only test EPA has approved and have no better basis for identifying the waste as hazardous. If EPA doesn't know whether (or which) wastes testing below the guidance threshold are hazardous, how can a generator know better what the Agency intended? Consider, for example, how we explained the TC levels, and how they are implemented – I believe we said TC wastes were clearly hazardous, implying that some waste below these levels may be hazardous. However, wastes below the TC levels are not reguated [sic] as hazardous (unless listed or for another char.). With a reinstatement, we would at a minimum create a serious up-hill battle in any enforcement we would consider bringing (we should discuss these issues with OECA and OGC).

And finally – the reality is, if we have something in place that seems to even minimally work, it makes the whole issue a lower priority for attention and resources. I do not intend to try to create an issue where there is not one. I do think the 1985 guidance was so fundamentally and seriously flawed that it cannot be used, and I do not think anyone within or outside the Agency has done an analysis that even purports to show otherwise. Remember, the magnitude of the error in relating the mismangement scenario to the lab test is 1800-fold. Use of the uncorrected test under any description of its reliability could effectively provide regualtory [sic] cover for alot of waste that may cause injury or death.

>>>SHEN-YI YANG 1/22/99 3:57 pm>>>
Dave, for the F wastes that delisting dealt with in the past (mostly F006 and F019), their CN were destroyed first and then chemically stabilized. The stabilized WWT sluges [sic] or filter cakes, if delisted, are shipped back by truck (open and not in a confined environment) and conditioned on going to subtitle D landfills or surface impoundments.

If OWS risk policies are, as I thought, that we will not consider short term risk (e.g., store waste in tank, or workers at site). Under current management practices and OSW risk policies, most F006 and F019 wastes similar to what we dealt with in the past I think they pose low risk to human health and environment.

However, I have little experience in some of the K-CN bearing wastes. I do not know much about how those waste are treated or currently managed, so I do not want to speculate about the risk.

If delisting has to (although I personally am not comfortable with the idea), we can delist those wastes that we can judge by process information and conditioned the waste going to management units that are not acidic/or confined environment. However, for certain F, K wastes and wastes generated by commercial treaters, I find it hard to guess how those wastes will behave in the field.

Before my response to you, I consulted with other OSW chemists and scientists. Followings [sic] are their valuable thoughts.

John: Absent a clear bright line as to what is reactive CN & sulfide, there can be no further delisting of reactive

wastes. A policy call that identifies what we are protecting against is needed. For example – protecting the worker opening drugs with gas in the headspace or a person entering a storage space/truck/tank and walking into a toxic atmosphere.

I'm also of the opinion that the current tests all work for what they are entended. [sic] However, the past guidance was flawed in the way the methods were used.

Barry concurred John's opinion.

Chi: A facility may claim that the petitioned waste has no or little cyanide in it based on their knowledge or process information (feed materilas [sic] for manufacturing, MSDSs, etc.). However, for wastes containing some cyanides (such as electroplating), it would be difficult for the facility to demonstrate without a legitimate test methodology or for the petition reviewer to make a judgement call.

In the interim before a revised guidance becomes available, perhaps the Regions/States should ask the facility to treat (destroy or stabilized) cyanide- or sulfide-bearing wastes as a way of delisting demonstration, or otherwise show why they think cyanides/sulfides would not be released to the environment. While we can include some sort of deference in the delisting language (for new delistings), I don't know how this could relieve any public concern and how we should address comments.

One more thing: I think under-estimation is still better than no methods at all.

>>>DAVID BUSSARD 01/21/99 05:16pm>>>

So, are those wastes unable to be delisted? Or, would we delist them conditioned on their "not being reactive"? Or, is there some other option given the current state of affairs?

>>>SHEN-YI YANG 01/21/99 03:30pm>>>

David, as I mentioned to you in my earlier lan message, based on the April 21, 98 memo from you and Barnes to Diana Love, Director of NEIC withdrawing CN and sulfide reactivity guidance, the withdrawal deleted the CN and sulfides thresholds (250 ppm and 500 ppm, respectively) and test methods in SW 846, Chapter 7 for reactive CN and sulfides. The methods SW9010/9012 for total CN, and 9030 for total sulfides remain effective.

Without the thresholds, even we have total concentrations of CN and sulfides, delisting has no way to determine whether or not the waste is reactive. (Plus that the test methods for CN and sulfides are often unreliable and biased-low.) In the past, we did make some judgement calls based on our process knowledge and argument presented in a pre-petition submitted by a potential petitioner. If we agreed with the petitioner that the waste was not CN or sulfides bearing waste, then we did waive the reactivity tests.

(Please let me know if Matt and you agree), for wastes that we can base process information and knowledge alone to make delisting decision as to reactivity, we may can [sic] add language to preamble and delisting conditions as you suggested. However, for certain wastes that I know such

as F006, K088 wastes and wastes generated by commercial waste treaters (e.g., Envirite) that they commingle their wastestreams, we find it difficult to determine or convince others (without analytical testings) whether or not the petitioned waste is clearly nonhazardous.

>>>DAVID BUSSARD 01/20/99 09:14am>>>

Matt understands that we have been clear in the past that a delisting does not shield one from characteristics.

He and I both feel, however, that if someone seeks a delisting for wastes where reactivity is a concern, and they provide data as to why they believe the waste is not reactive, we should take the stance (probably in writing, perhaps in the FR preamble) whether or not we find the kind of information they presented to be convincing or not regarding reactivity. If we do, we should state that it is the type of information to which we would give deference in applying the reactivity characteristic unless other compelling information was not shared or later comes to light. If we do not feel we can make a call on the basis of the information presented, we should talk. Matt would clearly like us to be in a position to make some sort of decision (hazardous/not-hazardous) and to at least state that if we judge it to be nonhazardous that they would get considerable deference in application of the reactivity characteristic until such time as we develop more specific guidance or rule text on what "reactivy" means.

While there are some nuances, I think that is consistent with my most recent communications with all of you. If that is not the case, please let me know and work with

ISPB to resolve the situation for the context of the reactivity test method notice.

EXHIBIT E

From: SHEN-YI YANG
To: DCAR01.DCARP02 (SMIDINGER-BETSY), DCCS01.DCCSP02 (BR . . .
Date: 8 February 1999 1:45 pm
Subject: Cyanide Reactivity/Criminal Prosecution -Forwarded -Reply

Greg, Delisting uses and relies on the 1985 reactivity guidance to determine if a waste generated by a particular facility is not hazardous (as to reactivity characteristic) and therefore, can be excluded from the requirements of hazardous waste regulations.

See discussions in pages 6-11 to 6-12 of *Petition to Delist Hazardous Wastes, A Guidance Manual;* September 1992; and pages 28, 33, and 34 of *Region 6 RCRA Delisting Program Guidance Manual for the Petitioner,* March 1996. Let me know if you would like to have copies of OSW and R6 delisting guidance documents.

2. Delisting established testing programs for facilities generating wastes that are conditionally delisted. The testing programs assist the facilities in assessing if their wastes are meeting the delisting criteria to be managed as nonhazardous. These 14 facilities are listed in 40 CFR Appendix IX. In additon [sic] to other testing requirements, these wastes are required to be sampled and

analyzed periodically for total cyanide and total sulfides, and for reactive cyanide and sulfide if the total results exceed the thresholds specified in the 1985 reactivity guidance (i.e., 250 ppm for cyanide; 500 ppm for sulfides). Followings are those 14 delistings.

Appendix IX to Part 261 – Reactive Wastes Excluded Under Secs. 260.20 and 260.22

Wastes Excluded From Non-Specific Sources (F-Wastes)

1. Envirite of IL (formerly Envirite Corp.), Harvey, IL, F007, F008, F009, F011, F019 wastes, probably stabilized, samples are apparently still analyzed, same for other Envirite facilities

Testing for reactive cyanide required. No test method specified. (SW-846 Chapter 7.3.3.2 is the only method that is currently available for reactive cyanide).

2. Envirite of OH (formerly Envirite Corp.), Canton, OH

Same as 1 above.

3. Envirite of PA (formerly Envirite Corp.), York, PA

Same as 1 above.

Wastes Excluded From Specific Sources (K-Wastes)

4. Bethlehem Steel Corp., Steelton, PA, chemically stabilized electric arc furnace dust/sludge (K061), testing for reactive cyanide & sulfide not required, but reactive levels must still not be exceeded

Initial testing required for reactive sulfide and cyanide; SW-846 methods required. Subsequent testing required

only for EP toxic metals and nickel. (Sulfide and cyanide levels in paragraph 3 pertain to initial testing only.)

5. Bethlehem Steel Corp., Johnstown, PA, chemically stabilized electric arc furnace dust/sludge (K061), testing for reactive cyanide & sulfide not required, but reactive levels must still not be exceeded

Same as 4 above.

6. BF Goodrich Intermediates Company, Inc., Calvert City, KY, Brine purification muds & saturator insolubles (K071), testing for reactive cyanide & sulfide probably no longer done, pending acceptable test results

7. CF&I Steel Corp., Pueblo, CO, chemically stabilized electric arc furnace dust/sludge (K061), testing for reactive cyanide & sulfide not required, but reactive levels must still not be exceeded

Initial testing required for reactive sulfide and cyanide; SW-846 methods required. Subsequent testing required only for EP toxic metals and nickel. (Sulfide and cyanide levels in paragraph 3 pertain to initial testing only.)

8. Envirite of IL (formerly Envirite Corp.), Harvey, IL, K002, K003, K004, K005, K006, K007, K008 wastes, probably stabilized, samples are apparently still analyzed, same for other Envirite facilities

Testing for reactive cyanide required. No test method specified. (SW-846 Chapter 7.3.3.2 is the only method that is currently available for reactive cyanide).

9. Envirite of OH (formerly Envirite Corp.), Canton, OH

Same as 8 above.

10. Envirite of PA (formerly Envirite Corp.), York, PA

Same as 8 above.

11. Occidental Chemical Corp., Muscle Shoals Plant, Sheffield, AL, Retorted WW treatment sludge from the Hg cell process in C12 production (K106), testing for reactive cyanide & sulfide probably no longer done, pending acceptable test results

12. Occidental Chemical Corp., DE City, DE, brine treatment muds, testing for reactive cyanide & sulfide probably no longer done, pending acceptable test results

13. Roanoke Electric Steel Corp., Roanoke, VA, chemically stabilized electric arc furnace dust/sludge (K061), testing for reactive cyanide & sulfide not required, but reactive levels must still not be exceeded

Initial testing required for reactive sulfide and cyanide; SW-846 methods required. Subsequent testing required only for EP toxic metals and nickel. (Sulfide and cyanide levels in paragraph 3 pertain to initial testing only.)

16. USX Steel Corp., USS Division, Southworks Plant, Gary Works, Chicago, IL, chemically stabilized electric arc furnace dust/sludge (K061), testing for reactive cyanide & sulfide not required, but reactive levels must still not be exceeded

Initial testing required for reactive sulfide and cyanide; SW-846 methods required. Subsequent testing required only for EP toxic metals and nickel. (Sulfide and cyanide levels in paragraph 3 pertain to initial testing only.)

>>>GREG HELMS 02/02/99 08:13am>>>

I am forwarding a request for documents regarding sulfide/cyanide reactivity testing, the 1985 guidance, and its use in enforcement and delisting, among other things. I believe it is self-explanatory, but call if you have questions.

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(2)

Supreme Court, U.S.
FILED
JUL 15 2002
OFFICE OF THE CLERK

No. 01-1502

In the Supreme Court of the United States

ALLAN ELIAS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record
THOMAS L. SANSONETTI
Assistant Attorney General
DAVID M. UHLMANN
DAVID C. SHILTON
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(202) 514-2217

32 pgs

QUESTIONS PRESENTED

The Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. 6901 *et seq.*, regulates the transportation, treatment, storage, and disposal of hazardous waste. Petitioner was convicted under RCRA's criminal provisions of improperly storing and disposing of hazardous cyanide-bearing waste that seriously injured an individual. The questions presented are:

1. Whether the court of appeals correctly rejected petitioner's defense that the United States loses its authority to enforce the criminal provisions of RCRA once the Environmental Protection Agency (EPA) authorizes a State to operate a RCRA hazardous waste program.

2. Whether the court of appeals correctly concluded that the United States adequately demonstrated that petitioner stored and disposed of hazardous waste.

3. Whether the court of appeals correctly rejected petitioner's defense that the United States had to show that the waste was hazardous through a particular test in an EPA guidance manual.

4. Whether, in the face of allegations of jury tampering, the court of appeals correctly placed the burden on the United States to show that the alleged jury tampering did not cause prejudice and placed the burden on petitioner to show that, notwithstanding the absence of prejudice, there existed juror bias.

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In the Supreme Court of the United States

No. 01-1502

ALLAN ELIAS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A37) is reported at 269 F.3d 1003. An accompanying memorandum decision (Pet. App. A38-A44) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 23, 2001, and amended on December 21, 2001. A petition for rehearing was denied on January 4, 2002 (Pet. App. A127). The petition for a writ of certiorari was filed on April 4, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Idaho, petitioner was convicted on one count of storing or disposing of hazardous waste without a permit, knowing that his actions placed others in imminent danger of death or serious bodily injury, in violation of 42 U.S.C. 6928(e); two counts of improper disposal of hazardous waste without a permit in violation of 42 U.S.C. 6928(d)(2); and one count of making material false statements to government investigators, in violation of 18 U.S.C. 1001. Petitioner was sentenced to 204 months' imprisonment and ordered to pay restitution in the amount of $6.3 million. The court of appeals affirmed the conviction and sentence of imprisonment, but set aside the restitution order. Pet. App. A1-A35.

1. Congress enacted the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. 6901 *et seq.*, to address increasingly serious environmental and health dangers arising from the generation, management, and disposal of waste. Congress's overriding concern was "the effect on the population and the environment of the disposal of discarded hazardous wastes—those which by virtue of their composition or longevity are harmful, toxic or lethal" and "present a clear danger to the health and safety of the population and to the quality of the environment." H.R. Rep. 1491, 94th Cong., 2d Sess. 3 (1976). Through Subtitle C of RCRA, 42 U.S.C. 6921-6939e, Congress created a nationwide program for protecting the public from the dangers of improper hazardous waste disposal. Subtitle C establishes a "'cradle-to-grave' regulatory structure overseeing the safe treatment, storage and disposal of hazard-

ous waste." *United Techs. Corp.* v. *EPA*, 821 F.2d 714, 716 (D.C. Cir. 1987).

RCRA charges the Environmental Protection Agency (EPA) with responsibility to establish a comprehensive national regulatory program for hazardous waste management. EPA must identify hazardous wastes, 42 U.S.C. 6921; see 40 C.F.R. Pt. 261, which triggers notification requirements for facilities engaged in hazardous waste activity, 42 U.S.C. 6930. EPA must also prescribe regulatory standards for generators and transporters of hazardous waste and owners and operators of hazardous waste treatment, storage, and disposal facilities. 42 U.S.C. 6922-6924 (1994 & Supp V 1999); see 40 C.F.R. Pts. 262-266. In addition, EPA must establish a permit program for owners and operators of such facilities. 42 U.S.C. 6925 (1994 & Supp. V 1999) ; see 40 C.F.R. Pt. 270.

RCRA also creates a process by which a State may request EPA to "authorize" a state hazardous waste program to operate "pursuant to this subchapter," meaning Subtitle C of RCRA. See 42 U.S.C. 6926 (Pet. App. A128-A132). (Subtitle C of RCRA is codified as Subchapter III of Chapter 82 of Title 42 of the United States Code.) To receive authorization, a state regulatory program must be equivalent to and consistent with the federal program and must provide for adequate enforcement. 42 U.S.C. 6926(b).

RCRA directs EPA to ensure that hazardous wastes are managed nationally in a responsible manner. 42 U.S.C. 6902(b). At the same time, it has long been a federal goal and EPA policy to encourage and support States that seek authorization for their hazardous waste management programs. 42 U.S.C. 6902(a)(7). Recognizing both the national interest in consistent and effective implementation of the RCRA program and the

state interest in program administration at the local level, RCRA provides for the co-existence of independent federal and state authority in authorized States. Thus, while States can assume responsibility for program administration at the local level, EPA has continuing oversight responsibilities concerning the activities regulated under state programs. For example, EPA has authority to revoke a state-issued permit if the permittee fails to comply with RCRA requirements, 42 U.S.C. 6928(a)(3), and to withdraw program authorization if the State is not administering its program in accordance with RCRA, 42 U.S.C. 6926(e).

RCRA also vests the federal government with independent authority to take direct enforcement action in States with authorized hazardous waste programs. 42 U.S.C. 6928 (Pet. App. A133-A140). For instance, EPA may issue compliance orders and assess administrative civil penalties against those who violate RCRA in such States, and it may also request the Justice Department to commence a judicial action seeking injunctive relief and civil penalties. 42 U.S.C. 6928(a)(1). In either instance, Congress has directed EPA to give notice to the State before "issuing an order or commencing a civil action under this section." 42 U.S.C. 6928(a)(2). The United States may also seek federal criminal penalties against persons who knowingly violate RCRA requirements, including persons who fail to obtain, or violate the requirements of, "a permit under this subchapter." 42 U.S.C. 6928(d)-(e).

2. Petitioner owned Evergreen Resources, a fertilizer company located near Soda Springs, Idaho. Pet. App. A2. In August 1996, petitioner decided to store sulfuric acid in a 25,000-gallon tank that held at least one to two tons of cyanide-laced sludge. *Ibid.* Petitioner knew, based on his prior use of the tank, that the

sludge contained cyanide. *Ibid.*; *id.* at A38-A39. He decided that the sludge, which was hardened and more than a foot deep, had to be disposed of before he could use the tank for sulfuric acid storage. *Id.* at A2.

On August 26, 1996, petitioner ordered four of his employees, Bryan Smith, Gene Thornock, Darrin Weaver, and Scott Dominguez, to enter the tank and wash the sludge out of a valve opening in the end. Pet. App. A2. Despite Smith's repeated requests, petitioner failed to provide any safety equipment. *Ibid.* Consequently, Dominguez and Weaver entered the tank wearing only their regular work clothes. *Id.* at A2-A3. After about fifteen minutes, they realized that the sludge could not be washed out the small valve opening, and they exited. *Id.* at A3. Both complained of sore throats and nasal passages. *Ibid.*

The next morning, on August 27, 1996, petitioner met with his employees, who told him of the difficulties of the day before and the health effects they had suffered. Pet. App. A3. Smith again insisted on the necessary safety equipment. *Ibid.* Petitioner said he would provide safety equipment, but he directed his employees to commence cleaning the tank without the equipment and stated that he expected the tank to be cleaned out that morning. *Ibid.* On past occasions, petitioner had similarly failed to take adequate safety precautions to protect employees from cyanide exposure. *Id.* at A39.

After cutting a bigger drainage opening in the end of the tank, Dominguez and Weaver again entered the tank with no safety equipment. Pet. App. A3. About 45 minutes later, after they had emptied about one-third of the sludge through the hole onto the ground, Weaver shouted that Dominguez had collapsed. *Ibid.* Thornock and Smith unsuccessfully tried to get Dominguez out of the tank, which had only a 22-inch manhole at the top.

Ibid. When firefighters arrived to rescue Dominguez, he was in severe respiratory distress and in danger of dying. *Ibid.*

After extricating Dominguez, the fire chief asked petitioner whether cyanide might be in the tank. Pet. App. A3. Petitioner insisted that he had no knowledge of anything in the tank other than water and sludge, which the fire chief understood to mean mud. *Ibid.* After Dominguez was rushed to the hospital, the treating physician concluded that the most likely cause of his condition was cyanide poisoning. *Id.* at A3-A4. He called petitioner and asked whether the tank might contain cyanide, to which petitioner again replied no. *Id.* at A4. The doctor nonetheless ordered a cyanide antidote kit, to which Dominguez responded positively. *Ibid.* Blood tests showed extremely toxic levels of cyanide in his body. *Ibid.*

Dominguez now suffers from permanently debilitating injuries, including severe neurological impairment. Pet. App. A81; Tr. 1383-1385, 3226-3228. He exhibits symptoms like those associated with Parkinson's disease, with slow and rigid muscle movements, poor balance, and a very "flat" demeanor. Tr. 3194, 3199-3201. He cannot drive or hold a job or care for himself for any extended periods. Tr. 3268-3273. He has great difficulty feeding himself, and his parents must wake up several times a night to turn him over in bed. Tr. 3268-3269. His symptoms are classic results of cyanide poisoning. Tr. 3199-3200, 3216-3224, 3226-3227, 3523.

The day Dominguez was injured, petitioner told investigators that he had completed a confined space entry permit, but he declined to show it to them. Pet. App. A4. Early the next morning, petitioner visited an acquaintance at a nearby company, where he inquired about the requirements for confined space entries and

departed with a copy of a safety manual that spelled out the requirements for a confined space entry permit. *Ibid*. The permit that petitioner eventually provided to investigators stated that it was issued on August 27, 1996, at 10:30 a.m. *Ibid.*

Petitioner had a long history of failures to handle cyanide and confined space entries properly or to prepare his employees to do so. Pet. App. A38-A39. His previous failures and attempts to evade enforcement were exhaustively documented at trial. *E.g.*, Tr. 1938-1957, 2012-2034, 2074-2075, 2155-2164, 2182-2189, 2273-2331, 2343-2345, 2551-2562, 2826-2830, 3099-3104, 3182-3183.

3. A federal grand jury returned an indictment against petitioner. Pet. App. A4, A45. Count I charged that he had stored or disposed of hazardous waste without a permit, knowing that his actions placed others in imminent danger of death or serious bodily injury in violation of 42 U.S.C. 6928(e). Pet. App. A4-A5, A45. Counts II and III charged petitioner with improper disposal of hazardous waste without a permit in violation of 42 U.S.C. 6928(d)(2). Pet. App. A5, A45. Count IV charged him with a violation of 18 U.S.C. 1001 for making material misstatements relating to the confined space entry permit that he alleged was prepared on August 27, 1996. Pet. App. A5, A47. The jury found petitioner guilty on all four counts. *Id.* at A5, A45.

4. The court of appeals affirmed the conviction and the resulting seventeen-year prison sentence in a published opinion and an unpublished memorandum. Pet. App. A1-A44. Although petitioner raised and the court ruled on numerous issues, only four are relevant here. First, the court rejected petitioner's defense that the United States lacks authority to enforce the criminal penalties set out in RCRA in States with authorized

hazardous waste programs. *Id.* at A6-A14. Second, the court ruled that the United States had to demonstrate only that some of the sludge was hazardous in order to prove the RCRA counts, and it rejected petitioner's assertion that the United States had to examine what petitioner considered a more "representative sample" of all the waste from the tank. *Id.* at A15-A17. Third, the court held that the United States was not required to employ a test for "hazardous" levels of cyanide that EPA published in a guidance document in 1985 and that, in any event, that test did not undermine the conclusion that the waste here was hazardous. *Id.* at A21-A24. Fourth, the court affirmed the district court's conclusion that a new trial was not required on account of two jury members' belief that petitioner's brief greeting to another juror had consisted of a joking offer of a bribe. *Id.* at A28-A32.

ARGUMENT

1. Petitioner contends (Pet. 9-17) that RCRA does not grant the United States the authority to bring an enforcement action for violations of RCRA permitting requirements in States that are authorized, under RCRA, to issue state permits for storage and disposal of hazardous waste. See 42 U.S.C. 6926(b); see also 40 C.F.R. 272.651 (EPA's authorization of Idaho's program). The court of appeals correctly rejected that argument, which rests on a fundamental misapprehension of RCRA and the resulting hazardous waste regulatory program. See Pet. App. A6-A14.

a. As explained above (pp. 2-4, *supra*), RCRA creates a *national* program for regulation of hazardous wastes. It directs EPA to set out national standards identifying hazardous wastes, 42 U.S.C. 6921, and regulating their generation, 42 U.S.C. 6922, transportation,

42 U.S.C. 6923, and treatment, storage, and disposal, 42 U.S.C. 6924 (1994 & Supp. V. 1999). RCRA also creates a national program, administered by EPA, for issuing permits to persons who own or operate facilities for treatment, storage, and disposal of hazardous wastes. 42 U.S.C. 6925 (1994 & Supp. V. 1999). RCRA additionally provides, however, that individual States may develop their own hazardous waste programs. 42 U.S.C. 6926. If a State develops a program that is consistent with RCRA's requirements, and EPA "authorizes" the program, then the State program operates "pursuant to this subchapter" (i.e., Subtitle C of RCRA). 42 U.S.C. 6926(b).

The fact that EPA has authorized a state hazardous waste program does *not* mean that the federal government thereafter lacks authority to enforce RCRA requirements, including the requirements of the authorized state program. Rather, RCRA explicitly preserves that federal authority. See, *e.g.*, 42 U.S.C. 6927(a) (preserving EPA's authority to request information from "any person" who stores, treats, transports, handles, or disposes of hazardous wastes); 42 U.S.C. 6928(a) (preserving EPA's authority to issue a compliance order to "any person" who is in violation of "any requirement of this subchapter"); 42 U.S.C. 6928(d) (subjecting "[a]ny person" who knowingly violates RCRA requirements to federal criminal sanctions).

Petitioner's contrary view rests on a misreading of the relevant provisions. Petitioner mistakenly suggests that Section 6926 of RCRA allows States to "opt out of the federal RCRA program." Pet. 10; see *id.* at 14. Quite the opposite is true. Section 6926 allows States to *opt into* RCRA by developing a "hazardous waste program *pursuant to this subchapter*." 42 U.S.C. 6926(b)

(emphasis added). Contrary to petitioner's suggestion (Pet. 15-16), the RCRA provisions governing authorization of state programs do not require the delegation of federal authority to States. Hence, petitioner's suggestion that such a delegation would pose constitutional problems is without merit.[1]

Section 6926(d) of RCRA, entitled "Effect of State permit," makes clear that, upon EPA's authorization of the state program, the State's permitting actions "have the same force and effect as action taken by the Administrator under this subchapter." 42 U.S.C. 6926(d). As a consequence, the federal government may bring an enforcement action based on state permit violations, including the failure to obtain a permit. See, *e.g.*, *United States* v. *MacDonald & Watson Waste Oil Co.*, 933 F.2d 35, 44 (1st Cir. 1991). As the First Circuit explained in the specific context of criminal enforcement:

> The statute [Section 6928(d)] criminalizes "Any person" who acts without, or in respect to facilities lacking, "a permit under this subchapter." A permit under this subchapter is one issued by the Administrator of the EPA or by an authorized state. 42 U.S.C. § 6925.

933 F.2d at 44. See 42 U.S.C. 6925(c)(1) ("Upon a determination by the Administrator (or a State, if applicable), of compliance by a facility for which a permit is

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[1] RCRA does not require a State to develop a state hazardous waste program. If it does develop such a program, the State may enforce the requirements of its program as a matter of state law, whether or not the program receives EPA authorization. EPA's authorization of a state program pursuant to RCRA is significant because, among other things, that authorization allows the federal government to enforce the state permitting requirements under federal law. 42 U.S.C. 6926(d).

applied for under this section with the requirements of this section and section 6924 of this title, the Administrator (or the State) shall issue a permit for such facilities."); see also, *e.g.*, 42 U.S.C. 6928(a)(3) (authorizing EPA to issue orders suspending or revoking "any permit issued by the Administrator or a State under this subchapter").

Petitioner also misreads Section 6926(b)'s specific provisions for authorization of a state program. Pet. 10, 13-14. Those provisions direct that, once a State submits an application for authorization of a state program, EPA shall issue a notice of whether it expects to authorize the program. 42 U.S.C. 6926(b). Section 6926(b) then continues:

> Such State is authorized to carry out such program in lieu of the Federal program under this subchapter in such State and to issue and enforce permits for the storage, treatment, or disposal of hazardous waste * * * unless, within ninety days following submission of the application the Administrator notifies such State that such program may not be authorized * * *.

42 U.S.C. 6926(b). That passage, read in context, simply makes clear that, once a state program is authorized, permit applicants should submit their applications to the State rather than EPA. 42 U.S.C. 6926(b). See 40 C.F.R. 271.1(f) ("upon approval of a State permitting program, the Administrator shall suspend the issuance of Federal permits for those activities subject to the approved State program"). The passage provides no basis for concluding that the federal government may not continue to exercise its explicit enforcement powers under RCRA. See Pet. App. A8-A9.

Contrary to petitioner's assertion (Pet. 10), this Court's decision in *United States Department of Energy* v. *Ohio*, 503 U.S. 607 (1992), does not suggest that Section 6926(b)'s "in lieu of" language deprives the federal government of enforcement authority. The Court stated:

> RCRA regulates the disposal of hazardous waste in much the same way [as the Clean Water Act, 33 U.S.C. 1251 *et seq.*], with a *permit program* run by EPA but subject to displacement by an adequate state counterpart.

Id. at 611 (emphasis added). See Pet. App. A13 n.29. The Court did not questoin EPA's power to exercise enforcement authority in States that have EPA-authorized water pollution control programs. See 33 U.S.C. 1319(a), 1342(b), 1342(i).[2]

Petitioner also points to the fact (Pet. 10-11) that EPA's regulations for approval of state hazardous waste programs require States to include "remedies for violations of State program requirements." 40 C.F.R. 271.16. But there is nothing unusual in the fact that both the federal government and the state government can take enforcement action with respect to the same wrongs. The concept of dual enforcement is a familiar

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[2] Petitioner's reliance on a passage from RCRA's legislative history suggesting that a State may "*take over* the hazardous waste program" (Pet. 10 n.5 (emphasis added by petitioner)) is similarly misplaced. That passage plainly is speaking to state assumption of responsibility for issuance of permits, since RCRA's *text* explicitly preserves federal enforcement authority. See, *e.g.*, 42 U.S.C. 6928 (discussed in text *infra*). Indeed the more relevant legislative history, pertaining to Section 6928, indicates that the federal government retains its criminal enforcement authority. See Pet. App. A11-A13; *MacDonald*, 933 F.2d at 44-45.

feature of federal environmental law. See, *e.g.*, 33 U.S.C. 1319(a), 1342(b), 1342(i) (Clean Water Act); 42 U.S.C. 300g-3 (Safe Drinking Water Act); 42 U.S.C. 7413 (Clean Air Act). Indeed, in the preamble to the Federal Register notice first codifying Idaho's authorized hazardous waste program, EPA emphasized that it "retains the authority under [42 U.S.C. 6928] of RCRA to undertake enforcement actions in authorized states." Pet. App. A9 n.14 (quoting 55 Fed. Reg. 50,327-50,401 (1990)).

Moreover, RCRA's specific enforcement provisions explicitly preserve federal enforcement in States with authorized programs. Section 6928(a)(1) empowers EPA to issue a compliance order or seek civil judicial relief against "any person [who] has violated, or is in violation of any requirement of this subchapter." 42 U.S.C. 6928(a)(1). Because RCRA allows EPA or an authorized State to issue a permit, 42 U.S.C. 6925(c), the failure to obtain a permit from either is a violation of a "requirement[] of this subchapter." See Pet. App. A8-A10; *Wyckoff Co.* v. *EPA*, 796 F.2d 1197, 1199-1200 (9th Cir. 1986). Similarly, Section 6928(d) subjects "[a]ny person who * * * knowingly treats, stores, or disposes of any hazardous waste identified or listed under this subchapter * * * without a permit under this subchapter" to federal criminal prosecution. 42 U.S.C. 6928(d). Like Section 6928(a), Section 6928(d) does not distinguish between federal and state permits. Thus, Section 6928 preserves the full panoply of federal enforcement options. Pet. App. A13 ("the federal government retains both its criminal and its civil enforcement powers"); *MacDonald*, 933 F.2d at 44 (Section 6928(d) "does not limit prosecutions thereunder to

those who deal with facilities lacking a *federal* permit.").[3]

In short, when EPA authorizes a state program, the program operates "pursuant to" Subtitle C of RCRA (42 U.S.C. 6926), but that authorization does *not* disable the federal government from continuing to exercise its overarching authority to enforce Subtitle C through criminal sanctions. Pet. App. A13. Even if RCRA's "plain language and legislative history" were not sufficient to eliminate any doubt on that score, EPA's long-standing interpretation of RCRA would be entitled to deference as a reasonable construction of a regulatory statute by the agency charged with its administration.

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[3] As the court of appeals and *MacDonald* explain, the legislative history of Section 6928(d) confirms the meaning of the text. Pet. App. A11-A13 (quoting *MacDonald*, 933 F.2d at 44-45). As they specifically observe:

> The 1984 amendments [to Section 6928(d) of RCRA] increased the applicable criminal penalties and simply substituted "under this subchapter" for the references to the specific subsections under which permits, federal and state, may be granted. The new language, "without a permit under this subchapter," subsumed both state and federal permits, as both types are provided for within "this subchapter." The latter did not, therefore, in any way narrow the scope of federal criminal jurisdiction.

Id. at A12-A13. The text of other portions of Section 6828 also demonstrates that federal enforcement authority survives state authorization. For example, Section 6928(a)(2) directs EPA to notify a State before taking civil enforcement action in a State that has an authorized program. 42 U.S.C. 6928(a)(2). Additionally, Section 6928(d) makes specific reference to criminal sanctions for non-compliance with "regulations promulgated by the Administrator (or by a State in the case of an authorized State program) under this subchapter." 42 U.S.C. 6928(d)(3), (4) and (5).

Pet. App. A7-A9; see, *e.g.*, *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

b. Petitioner is wrong in his assertions (Pet. 11-12, 14-16) that the court of appeals' construction of RCRA conflicts with decisions of this Court or another court of appeals. Neither this Court nor any court of appeals has ever held that the United States loses its enforcement powers under RCRA upon authorizing a State program. To the contrary, the courts of appeals have repeatedly affirmed federal convictions under RCRA based on unlawful activities in States with authorized RCRA programs.[4]

There is no merit to petitioner's contention (Pet. 14-15) that the court of appeals' decision in this case conflicts with *United States Department of Energy* v. *Ohio*, 503 U.S. 607 (1992). The Court in that case ruled that Congress had not waived the federal government's sovereign immunity from liability for civil penalties that a State sought to impose against a federal facility for alleged past violations of the CWA and RCRA. *Id.* at 611. Thus, the issue in that case bears no similarity

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[4] See, *e.g.*, *United States* v. *Henry*, 136 F.3d 12 (1st Cir. 1998) (New Hampshire); *United States* v. *Laughlin*, 10 F.3d 961 (2d Cir. 1993) (New York), cert. denied, 511 U.S. 1071 (1994); *United States* v. *Johnson & Towers, Inc.*, 741 F.2d 662 (3d Cir. 1984) (New Jersey), cert. denied, 469 U.S. 1208 (1985); *United States* v. *Dee*, 912 F.2d 741 (4th Cir. 1990) (Maryland), cert. denied, 499 U.S. 919 (1991); *United States* v. *Sims Bros. Constr., Inc.*, 277 F.3d 734 (5th Cir. 2001) (Louisiana); *United States* v. *Williams*, 195 F.3d 823 (6th Cir. 1999) (Tennessee); *United States* v. *Kelly*, 167 F.3d 1176 (7th Cir. 1999) (Wisconsin); *United States* v. *Freeman*, 30 F.3d 1040 (8th Cir. 1994) (Missouri); *United States* v. *Fiorillo*, 186 F.3d 1136 (9th Cir. 1999) (California), cert. denied, 528 U.S. 1142 (2000); *United States* v. *Self*, 2 F.3d 1071 (10th Cir. 1993) (Utah); *United States* v. *Hansen*, 262 F.3d 1217 (11th Cir. 2001) (Georgia), cert. denied, 122 S. Ct. 2326 (2002).

to the issue posed here. Petitioner nevertheless focuses on passages from the decision that rejected Ohio's contention that a *State's* assessment of civil penalties under an EPA-authorized state water pollution control program is permissible under Section 1323(a) of the Clean Water Act because those state-law penalties "aris[e] under Federal law" (33 U.S.C. 1323(a)). See 503 U.S. at 623-627. The Court recognized that "the complementary relationship between state and federal law" did not support the State's argument that "*state-law fines* thereby 'arise under Federal law.'" *Id.* at 625 (emphasis added). This federal prosecution, however, does not involve "state-law fines." The Court in no way suggested that the *federal government's* pursuit of federal criminal sanctions against an individual pursuant to Section 6928(d) of RCRA would be beyond the federal government's authority. As the court of appeals correctly recognized, that issue "was not an issue presented to or resolved by the *Ohio* court." Pet. App. A13-A14 n.29.

Petitioner is also wrong in asserting (Pet. 11-12) that the court of appeals' decision conflicts with *Harmon Industries, Inc.* v. *Browner*, 191 F.3d 894 (8th Cir. 1999) (reproduced at Pet. App. A145-A164). That case involved a federal government practice known as "overfiling." The federal government had initiated a civil enforcement action and continued that action after a State with an authorized program had resolved a state enforcement action on terms that the federal government believed to be inadequate. See 191 F.3d. at 897-898 (Pet. App. A150). As the court of appeals explained in this case, *Harmon* held that the federal government may not continue to pursue its own civil penalty action after a State that has an authorized program has settled the identical claim with the same defendant.

Pet. App. A10-A11. See 191 F.3d at 902 (Pet. App. A159) ("[W]e find that the EPA's practice of overfiling, in those states where it has authorized the state to act, oversteps the federal agency's authority under the RCRA."). But that court did *not* rule that EPA lacks authority to bring its own enforcement action in the absence of a state enforcement proceeding. See *id.* at 901 (Pet. App. A158) (EPA may proceed in accordance with Section 6928 "when the authorized state fails to initiate any enforcement action."); see also *id.* at 902 n.4 (Pet. App. A158 n.4) (reconciling its decision with *Wyckoff* on that basis).

As the court of appeals correctly recognized, *Harmon* "is not about if, but about when, the United States can bring a civil enforcement action in federal court after it has authorized a state program." Pet. App. A11 (quoting *United States* v. *Flanagan*, 126 F. Supp. 2d 1284, 1289 & n.3 (C.D. Cal. 2000)). Because the decision in *Harmon* dealt with an instance of the federal government's "overfiling" during a state civil action, and that decision expressly recognized that a federal enforcement action is permissible where, as here, there has been no state enforcement action, *Harmon* does not conflict with the decision in this case. (Indeed, in this case, the State of Idaho expressed its concurrence with the United States's criminal enforcement action. Govt. C.A. Supp. E.R. 58-59.) Hence, even assuming that *Harmon* is correct, that decision "does not support [petitioner's] contention that federal law is supplanted or that the United States lacks power to try him." Pet. App. A11.[5]

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[5] The United States District Court for the District of Colorado has declined to follow *Harmon*, concluding that it "incorrectly interprets the RCRA." *United States* v. *Power Eng'g Co.*, 125 F.

Petitioner is also mistaken in asserting (Pet. 12-13) that the decision of the court of appeals conflicts with *Dague* v. *City of Burlington*, 935 F.2d 1343 (2d Cir. 1991), rev'd in part, 505 U.S. 557 (1992). Contrary to what petitioner argues, that decision does not hold that the phrase "pursuant to this chapter" in RCRA's citizen-suit provision, 42 U.S.C. 6972(a)(1)(A), excludes suits alleging violations of permitting programs in authorized States. Indeed, that provision was not even at issue. The plaintiffs there had raised a claim under 42 U.S.C. 6972(a)(1)(A) but had not appealed its dismissal. 935 F.2d at 1348-1349, 1352. As relevant here, the decision in *Dague* states in dictum that "an EPA-authorized state hazardous waste program * * * can supersede the permit and notification requirements of [Subtitle C]." *Id.* at 1352. The decision does not bar citizens from bringing suit under RCRA to enforce permitting requirements in authorized States and does not address federal enforcement authority at all.

2. Petitioner contends (Pet. 17-22) that the court of appeals erred in failing to require the United States to show that the waste in question was hazardous based on what petitioner considered a more "representative sample" of the waste from the tank. Contrary to petitioner's arguments, the court of appeals correctly recognized that the government was under no obligation to test all of the cyanide-containing wastes in the tank and that there was ample evidence from which the jury could conclude that the waste was hazardous. Pet. App. A15-A17. That fact-specific decision is correct and does

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Supp. 2d 1050, 1059 (2000). That decision is currently on appeal to the United States Court of Appeals for the Tenth Circuit. No. 01-1217 (10th Cir. argued Mar. 20, 2002).

not conflict with any decision of this Court or another court of appeals.

To obtain convictions on the counts of the indictment under RCRA, the United States was required to prove that petitioner stored or disposed of hazardous waste without a permit. 42 U.S.C. 6928(d)-(e). EPA has defined "hazardous waste" by regulation to include solid wastes that have the characteristic of reactivity. 40 C.F.R. 261.3(a)(2)(i), 261.23 (Pet. App. A142-A143). Cyanide-bearing wastes are reactive, and thus hazardous, if a "representative sample" shows that the waste is capable of generating "toxic gases, vapors or fumes in a quantity sufficient to present a danger to human health or the environment." 40 C.F.R. 261.23(a)(5). A sample is "representative" if it "can be expected to exhibit the average properties of the universe or whole." 40 C.F.R. 260.10 (Pet. App. A141). In this case, a sample is sufficiently representative if it exhibits the average properties of the wastes that were removed from the tank, since those wastes were sufficient, by themselves, to establish storage and disposal violations. See Pet. App. A16-A17 (citing *In re Electric Serv. Co.*, 1 E.A.D. 947 (EPA Env. App. Bd. 1985)).

As the court of appeals explained, the United States did not need to show that all the waste in the tank was hazardous; rather, the government fulfilled its burden at trial by proving that petitioner had improperly stored or disposed of *some* hazardous waste. Pet. App. A16. Because (1) the waste samples that the United States' experts examined tested positive for cyanide, (2) the samples included waste that petitioner's employee was forced to remove from the tank, and (3) that employee became incapacitated and permanently injured through cyanide poisoning, the samples were sufficient to support the convictions. *Ibid.* As the court

of appeals observed, "[i]f a sample from one part of the tank contains wastes reactive enough to cause brain damage to someone, there can be no conceivable purpose in sending other people into the tank to extract more samples." *Id.* at A17.[6]

Petitioner's "hypertechnical interpretation" not only defies "common sense" (Pet. App. A17), it ignores the underlying purpose and import of EPA's regulations, which seek to avert the type of injury that occurred in this case. EPA requires "representative" samples to ensure that the hazardous characteristics of the material in question are properly identified. *Ibid.*; see Tr. 3324-3327. If a hazardous waste, such as cyanide-bearing sludge, is discovered in a tank, then "it's not necessary to go to every inch of the tank to see if there's more cyanide there." Pet. App. A17. It is sufficient if the sample demonstrates that the waste "can generate toxic gases, vapors or fumes, in a quantity sufficient to present a danger to human health or the environment." 40 C.F.R. 261.23(a)(5).

In any event, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable

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[6] Petitioner contends (Pet. 19 n.16) that, if he had only stored or disposed of "the few grams of cyanide-bearing waste tested," he would qualify as a small-quantity generator under EPA's regulations and would be exempt from prosecution. But petitioner was not prosecuted for those few grams, but for improper storage and disposal of wastes from which those samples were taken. Pet. App. A2. The samples were sufficient, together with the other evidence the government produced, to establish that the wastes were hazardous. Indeed, even if petitioner could have qualified as a small-quantity generator, he would still be subject to RCRA requirements. See 40 C.F.R. 261.5(a), (b) and (g).

doubt." *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979). The record here includes ample evidence from which a rational jury could conclude that the samples exhibited the "average properties" of the waste that was improperly stored and disposed of, including all the waste in the tank, and that the waste was hazardous. See 40 C.F.R. 260.10 (defining "representative sample"), 261.23(a)(5) (describing the characteristic of reactivity in the case of cyanide-bearing compounds).

First, the samples that were taken indicated that the wastes in the tank demonstrated the characteristic of reactivity. Tr. 3340-3347. Second, an expert explained at trial how the sampling of the sludge, under the circumstances, was representative and that there was no need to put those conducting the sampling at further risk by having them enter the tank to take more samples. Tr. 3344-3351, 3429-3434, 3463-3465. Third, a hazardous materials team that responded to the site additionally found hydrogen cyanide gas in samples taken from both inside and outside the tank. Tr. 1108-1110, 1180-1209. And fourth, petitioner's injured employee, who was directly exposed to the wastes in the tank, demonstrated the symptoms and permanent effects of cyanide poisoning. Tr. 3223-3228, 3194-3200.

The evidence adduced at trial, viewed in its totality, demonstrated beyond doubt that the waste within the tank could generate gases sufficient "to present a danger to human health" and was thus hazardous. 40 C.F.R. 261.23(a)(5). See *Huddleston* v. *United States*, 485 U.S. 681, 691 (1988) ("[I]ndividual pieces of evidence, insufficient in themselves to prove a point, may in cumulation prove it."). The evidence plainly was sufficient for the jury to have concluded, beyond a reasonable doubt, that the waste was hazardous under

the regulations. That factbound determination does not warrant review by this Court.[7]

3. Petitioner argues (Pet. 22-26) that he lacked fair notice of the standards under which he could be convicted because a sample of the waste was not hazardous under an EPA guidance manual, known as SW-846, that elaborated on a test for cyanide-bearing wastes. That non-binding guidance described a test method for determining whether cyanide-bearing waste is reactive. Contrary to petitioner's suggestion (Pet. 25), the guidance manual is not incorporated into EPA's regulations for purposes of determining whether a waste is reactive, and thus hazardous. See 40 C.F.R. 261.3(a)(2)(i), 260.11(a) and (a)(11), 261.23. In any event, his argument fails for two main reasons.

First, SW-846 did not purport to draw a line between what was and what was not hazardous waste. Instead, that guidance suggested a "quantitative threshold for toxic gas generation" above which waste was clearly hazardous, without denying that some wastes below that threshold would also be hazardous. Pet. App. A21-A22. That is, the guidance did not purport to indicate a "'safe harbor' for waste that emitted toxic gas below the threshold level." *Id.* at A24, A86. Petitioner admitted as much in his reply brief in the court of appeals. C.A. Rep. Br. 19. Thus, even if the United States were bound by SW-846, the fact that the waste at issue was

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[7] Petitioner suggests (Pet. 21) that the court of appeals' decision is in tension with *Renaud* v. *Martin Marietta Corp.*, 972 F.2d 304 (10th Cir. 1992), which observed, in the context of a tort claim, that "no one has any idea whether this [particular] sample is representative of the 'normal' contaminant concentration." *Id.* at 308. That remark, made outside the RCRA context, plainly does not give rise to a conflict among the courts of appeals.

not proven hazardous under that test would present no reason to question petitioner's conviction.

Second, petitioner's "fair notice" argument founders on the undisputed fact that petitioner did not even know of SW-846. Pet. App. A23. Although he argues that "fair notice" arguments do not depend on actual notice, Pet. 23-24, his argument is not really based on "fair notice" at all. Petitioner no longer contends that the underlying regulation would be impermissibly vague and that he would lack fair notice without the quantitative threshold provided by SW-846. The court of appeals rejected that argument, Pet. App. A17-A20, and petitioner does not renew it here. Rather, he now relies on the argument that EPA cannot disclaim SW-846 because EPA had used it for some purposes in the past. Pet. 22-23, 25-26. As the district court recognized, that argument rests on estoppel, not fair notice. Pet. App. A90-A91. Because such an argument is unavailable absent actual reliance by the party claiming estoppel, it is unavailable to petitioner here. *Ibid.*; see *United States* v. *Weitzenhoff*, 35 F.3d 1275, 1290 (9th Cir. 1993), cert. denied, 513 U.S. 1128 (1995).

4. Petitioner argues (Pet. 26-28) that the court of appeals erred by concluding that he bore the burden to show that he had been prejudiced by two jurors' belief that his brief greeting to another juror had consisted of a joking offer of a bribe. He mistakenly contends that this allocation of the burden conflicts with decisions of this Court and various other courts of appeals. *Ibid.*

Petitioner misapprehends the decision of the court of appeals. Contrary to his contention (Pet. 27), that court did not flout this Court's decision in *Remner* v. *United States*, 347 U.S. 227 (1954), by requiring him to carry the burden to show that any jury tampering did not prejudice him. The district court found that no juror

thought that he had tampered with the jury and that the United States had carried its burden of dispelling any associated presumption of prejudice. Pet. App. A123. The court of appeals affirmed the district court's findings as not clearly erroneous. *Id.* at A30-A32. Thus, the decision is consistent with the decisions that petitioner cites indicating that jury tampering raises a presumption of prejudice that the government bears the burden to dispel.[8]

The court of appeals referred to petitioner's burden in addressing a separate question: whether the jury was nevertheless biased against him even though no juror believed that he actually tampered with the jury. Pet. App. A32 & n.70. The district court addressed that issue separately from the "closely related" issue of jury tampering and noted that the defendant bears the burden of showing that a juror is biased. *Id.* at A10[illegible], A123. The district court concluded that petitioner had not carried the burden of showing any such bias. *Id.* at A123. The court of appeals affirmed, stating that "the district court's conclusion that [petitioner] had not borne his burden of showing juror bias appears correct." *Id.* at A32 (footnote omitted). That allocation of the burden of showing bias is consistent with this Court's decisions. *E.g.*, *Wainwright* v. *Witt*, 469 U.S. 412, 423 (1985); *Irvin* v. *Dowd*, 366 U.S. 717, 723 (1961). Petitioner cites no decisions that question that result.

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[8] Although petitioner is correct that there is some disagreement among the courts of appeals on whether the government always bears the burden of showing that jury tampering did not prejudice the defendant, Pet. 26-27 & n.18, the government carried that burden here and thus this case does not present an occasion for resolving the tension in those cases.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 2002

(3)

Supreme Court, U.S.
FILED
SEP 18 2002
CLERK

No. 01-1502

In The

Supreme Court of the United States

ALLAN ELIAS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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16 pp

QUESTIONS PRESENTED

1. Whether the District Court lacked jurisdiction over the Resource Conservation and Recovery Act (RCRA) criminal charges because the federal RCRA laws had been replaced and supplanted by Idaho's own hazardous waste laws, pursuant to 42 U.S.C. § 6926(b)?

2. Whether the Government must prove that a sample from a large body of material is representative of the entire body in order to prove that a characteristic waste is a hazardous waste, subject to RCRA regulation?

3. Whether the Government's departure from a long-standing and consistently applied administrative practice, which would have determined that the material at issue was not a hazardous waste, violates the Constitutional fair notice requirement?

4. Where the defendant has shown jury tampering to have occurred during trial, is it the Government's burden to show no juror prejudice, or is it the defendant's burden to show actual juror prejudice?

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I. REPLY TO NEW ARGUMENTS RAISED IN GOVERNMENT'S BRIEF IN OPPOSITION

A. The Court Should Accept Review to Determine the Extent of Federal Criminal Jurisdiction Over Permit Violations in Authorized States.

While numerous courts, including this Court, have read the language of 42 U.S.C. § 6926(b) (an authorized state may "issue and enforce" permits "in lieu of" federal RCRA law) to mean that the federal program is "displaced" by state laws and regulations, the Government states that it means only that "permit applicants should submit their applications to the State rather than the EPA." (Opp.:11). Petitioner submits that a far greater difference was intended; the statute contemplates that the federal government cede not only the permitting system, but also the right to enforce State permits. *See Harmon Industries, Inc. v. Browner,* 191 F.3d 894, 899 (8th Cir. 1999) ("The plain 'in lieu of' language contained in the RCRA reveals a congressional intent for an authorized state program to supplant the federal hazardous waste program in all respects, including enforcement.") The need for this Court to resolve this issue has been heightened by the Tenth Circuit's September 4, 2002, holding in *United States v. Power Engineering Co.*, (10th Cir. No. 01-1217), where the court held, contrary to *Harmon*, that federal enforcement rights are not affected by state authorization pursuant to § 6926(b).

The EPA historically held the view that Congress intended that the State program would supplant the federal program pursuant to § 6926(b):

> If the federal hazardous waste regulations were to apply to handlers of hazardous waste in authorized states, those persons would be continuously subjected to a dual set of laws and regulations . . . Such dual regulation is presumably what Congress intended to phase out in an orderly manner when it adopted the provisions of Section 3006(b).

EPA Enforcement Memorandum, March 15, 1982, at 15-8. Since the State permittee can only be held to the laws, regulations, and penalties incorporated in the State permit, the EPA acknowledged the primacy of the State program, "The federal program, in effect, ceases to exist in that state." *Id.* at 15-13.

The Government notes that the RCRA statutory structure explicitly provides for a continuing federal role, even after a State program is authorized. (Opp.:9). However, the courts have long held that certain limited federal functions continue even in authorized states. *Washington v. EPA*, 752 F.2d 1465, 1467 (9th Cir. 1985).

The Government argues that the fact that actions taken by a State Administrator are treated as having the "same force and effect" as EPA actions (§ 6926(d)) implies that, "the federal government may bring an enforcement action based on state permit violation." (Opp.:10). However, rather than presupposing ongoing general enforcement activity by the federal government, the more logical reading of the statute is that in situations, such as those described in § 6928(a)(2) or any other retained power, where prior action by the permitting authority may be at issue, prior action in the state system is treated with equal dignity to that of the federal system.

A subordinate federal enforcement role is consistent with the State-federal partnership envisioned by Congress. RCRA establishes a system by which the federal government will establish *minimum* requirements. If State laws meet or exceed these federal requirements, the State is permitted to operate its own permitting system "in lieu of" the federal system. After authorization under § 6926, the federal government retains an oversight role to ensure that the federal minimum standards continue to be met in that State. However, there is simply no textual support for the Government's claimed "overarching authority to enforce Subtitle C [of RCRA] through criminal sanctions." (Opp.:14).

The most significant dispute between Elias and the Government, however, concerns the interpretation of the

phrase "under this subchapter." Citing the First Circuit's opinion in *United States v. MacDonald & Watson*, 933 F.2d 35 (1st Cir. 1991), the Government argues that the phrase is all-inclusive, covering not only federal permits issued pursuant to RCRA regulations (the "federal program"), but also state permits issued by state permitting systems, which were, in turn, specifically approved by the EPA pursuant to § 6926(b) (a "state program"). However, reliance upon *MacDonald*'s inclusive holding is unpersuasive because the decision failed to address the significance of the 1984 Amendments to § 6928.[1]

More fundamentally, the Government fails to address the two most cogent sources of authority regarding the proper articulation of the relationship between federal and state law. In *DOE v. Ohio*, 503 U.S. 607, 624-25 (1992), the Court considered whether penalties imposed pursuant to State environmental statutes approved by the EPA, and supplanting federal law, were penalties "arising under federal law" for purposes of the waiver of sovereign immunity. Despite the fact that the State environmental statutes had been "enabled" pursuant to an authorization scheme, the *DOE v. Ohio* Court held that the state penalty did not "arise under" federal law. Thus, after *DOE*, it is incorrect to claim, relying on *MacDonald & Watson*, that a permit issued pursuant to authorized State laws is a permit "under this [federal] subchapter" for purposes of § 6928(d).

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[1] The 1984 Amendment to 42 U.S.C. § 6928(d)(2) eliminated federal authority to criminalize violations of a State-issued permit. The amendment struck the parenthetical "(or section 6926 in case of a state program)" from (d)(2), while appending similar language to (d)(3), (d)(4) and (d)(5). The substituted phrase, "under this subchapter," cannot *subsume* both state and federal permits because an amended act cannot be viewed as a mere affirmation and clarification of an earlier statute. "It is a rule of law when revising a statute, or one enacted for another, omits provisions contained in the original act, the parts omitted cannot be kept in force by construction, but are annulled." *Stewart v. Kahn*, 78 U.S. 493 (1871).

The Government attempts to distinguish *DOE v. Ohio* by claiming that this case is not about state law fines, but about federal criminal jurisdiction. However, the principle is identical; even when a State's exercise of power is expressly enabled by federal law, the rights and liabilities created by State law cannot be said to "arise under federal law." *DOE v. Ohio*, 503 U.S. at 625-626.

Likewise, the Government avoids discussing the "citizen suit" cases under § 6972(a)(1)(A), which consider whether there is federal court jurisdiction over citizen suits in authorized States. The governing statutory language provides for jurisdiction when there is a violation "under this chapter." While, as set out in the Petition, the cases have reached divergent results, the better reasoned cases have concluded that federal jurisdiction disappears. *See, e.g., Williamsburgh-Around-the-Bridge Block Ass'n v. Jorling*, 1989 WL 98631 (N.D. N.Y. 1989); *Thompson v. Thomas*, 680 F. Supp. 1, 3 (D.D.C. 1987).

B. The Court Should Accept Review to Determine the Scope of the Government's Requirement to Prove "Representativeness" in Civil and Criminal Environmental Cases.

In its Opposition, the Government fails to acknowledge the requirements of its own regulations, 40 C.F.R. § 261.23, that it must prove that its sample is representative of the average properties of the material "as a whole." The Government only argues that the sample itself was sufficient to support the conviction. (Opp.:19.) This misunderstanding was shared by the Ninth Circuit when it stated, "It was reactive and tested positive for cyanide. No further evidence is necessary." (269 F.3d 1013-14.) Those conclusions miscomprehend the purpose of the regulatory requirement of "representativeness."

Industrial process wastes differ from plant to plant, even in the same industry. It is quite common for there to be variation in uniformity and concentration, especially among reactive waste. 45 F.R. 33109. To avoid enforcement based on an anomaly, industry is regulated on the basis of

a "representative sample." "Representative sample" is thus a term of art, which provides industry with protection against having penalties imposed on the basis of accidental and unavoidable anomalies.

In some instances, courts have permitted the Government to prove "representativeness" with evidence that is deemed "equivalent" to that of a scientifically obtained sample. *See United States v. Hansen*, 262 F.3d 1217, 1241 (11th Cir. 2001). The average properties of the "whole or the universe" may be proved through inventories, hazardous waste logs, internal memoranda, etc.[2]

However, the Government did not offer such alternative evidence. Instead, it argues that since the victim was exposed to cyanide and that some samples were taken, which (under a newly-devised test) showed harmful levels of releasable cyanide, the samples themselves were sufficient to support the conviction. (Opp.:19). Citing portions of the transcript, the Government claims that its trial expert, Dr. Lowry, explained "how the sampling of the sludge, *under the circumstances*, was representative and there was no need to put those conducting the sampling at further risk by having them enter the tank to take more samples." (Opp.:21) (*Emphasis supplied.*) However, in the transcripts, Dr. Lowry only asserted that the samples were representative of the material *to which Dominguez was exposed*, as opposed to representative of the material as a whole. (Tr.:3010).[3]

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[2] The Government also cited *United States v. Baytank (Houston) Inc.*, 934 F.2d 599, 614 (5th Cir. 1991) and *United States v. Self*, 2 F.3d 1071, 1086-87 (10th Cir. 1993) in support of the use of grab samples. However, these cases involved "listed" hazardous substances, "EDB" and "MEK", respectively (the presence of any amount of which constitutes a violation); as distinguished from "characteristic" hazardous wastes which require the testing of a representative sample.

[3] The Government's alternative argument, that EPA investigators should not be put at risk to obtain truly representative samples, must be rejected. There were no exigent circumstances, and there was testimony by the Government's expert witness that sampling could

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Having failed to show that it obtained scientifically representative samples, the Government is forced to contend only that "there was ample evidence from which a rational jury could conclude that the samples exhibited the average properties of the waste . . . including all of the waste in the tank, and that the waste was hazardous." (Opp.:21.) By arguing that the cyanide-related injury suffered by the victim, together with the test result run from the limited samples obtained from the same region of the tank, constitute evidence of "representativeness" (Opp.:21), the Government implicitly concedes that it introduced *no evidence* showing that sample was "representative."

Even if it were proper to allow juries to decide whether a sample is statistically "representative" in the absence of expert guidance (how many samples? from how many discrete locations?), there is no evidence in the record from which the jury could have found that the sample was representative. Viewing the evidence in the light most favorable to the Government, the only evidence introduced was that the material from the samples, taken by investigators from near the opening of the 25,000 gallon tank, contained "hazardous" levels of cyanide. There was no evidence that the material in the tank was homogeneous, but rather an admission by the Government's expert that it was not. (Tr.: 3003, 3020). Thus, the jury had no evidence before it from which it could reasonably infer that the grab sample taken by Government investigators was "representative" as required by the regulations and case law.

While, as set out in the Petition, the regulations governing "characteristic wastes" (including "reactive cyanide wastes") under RCRA employ this term, the phrase is

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have been done safely. Tr: 2474-2475. There is no exception to the regulatory requirement that a "representative sample" be obtained in situations where the material is potentially dangerous. And such an exception would be nonsensical, given EPA's role in regulating *hazardous* wastes.

not unique to reactive waste, RCRA, or even environmental law. A Westlaw search of the Code of Federal Regulations reveals that 450 different regulations employ that term, from tobacco inspection to product safety, and from liquor to fisheries. Less than a third of these regulations are environmental regulations, and only a fraction of these relate to RCRA.

The Ninth Circuit's rejection of the content of the "representativeness" requirement in waste disposal cases renders illusory the protections afforded the regulated community by the scientific standard inherent in the term "representative sample." The plain meaning of literally hundreds of regulations is at stake, and Certiorari should be granted to clarify the meaning of this widely-used term.

C. The Court Should Accept Review to Determine Whether a Regulation Defining a Crime Can Depart from the Intelligible Principle of the Statute and Regulations and Prior Administrative Practice.

The only "ascertainable standard" relating to releasable cyanide was set out in the SW-846 testing protocol. Without the scientific criteria of the SW-846 protocol, the prose definition of "reactive cyanide-bearing waste" does not conform to the mandate of 42 U.S.C. § 6921(b)(1) that a material be subject to regulation only if it contains wastes "at levels in excess of levels" set out in published thresholds. The EPA has interpreted this requirement to mean that the characteristic "be capable of being defined in physical, chemical or other properties measurable by standardized and available testing procedures." 45 F.R. 33105.

Without the standardized testing protocol set out in the SW-846 reactivity tests, the narrative reactivity regulation does not meet the statutory requirement of setting out a measurable tolerance, or providing fair notice to the regulated community.

The Government fails to address that, in a series of cases, the D.C. Circuit has ruled that agency's regulations and other public statements are taken into account in

determining whether regulators have provided the regulated community with information sufficient to identify with ascertainable certainty the standard to which the agency expects the community to conform, *General Electric Company v. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995) ("*GE*"); *Rollins Environmental Services v. EPA*, 937 F.2d 649, 653 (D.C. Cir. 1991); *Meehan v. Macy*, 392 F.2d 822, 838-839 (D.C. Cir. 1968). These cases are significant, because they limit the civil and criminal penalties that agencies can seek to impose when the agency has announced a *de facto* standard to the regulated community.

After the events in this case, the Government employed the SW-846 test for releasable cyanide to determine if the material from the tank was hazardous. However, the SW-846 test results did not support the Government's theory. To prosecute Elias, the Government had to resurrect a test that the EPA had previously rejected as a replacement for the SW-846 test.[4] This was an unfair departure and violated the fair notice requirement, and the Court should accept review in order to determine whether an agency is bound by its previously-announced informal standards.

D. The Court Should Accept Review to Determine Whether, When Jury Tampering is Found to have Occurred, it is the Government's Burden to Show No Reasonable Possibility of Prejudice, or Whether it is the Defendant's Burden to Establish Prejudice.

The Government attempts to salvage the Ninth Circuit's ruling that the defendant is allocated the burden

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[4] The Ninth Circuit trivialized the SW-846 test, stating, "growing dissatisfaction with it prompted EPA to remove it." 269 F.3d at 1016. However, that statement is incorrect, as the SW-846 reactivity test has never been removed. *See* http:www.epa.gov/epaoswer/hazwaste/test/9xxx.htm.

of demonstrating bias in a jury tampering case by arguing that the Ninth Circuit really considered two distinct issues, (1) whether there was jury tampering, and (2) the "closely related" issue of whether the defendant had shown jury bias. (Opp.:24). The Government suggests that the Ninth Circuit placed the burden on the defendant only with respect to the "jury bias" determination.

Unfortunately, the Government's theory does not square with what the Ninth Circuit understood to be the issue before it. Rather than reviewing the evidence to determine if the Government had proven "beyond a reasonable doubt" that "there was no reasonable possibility that the jury could have been affected," the Ninth Circuit viewed the entire matter as a juror bias case. The entirety of the Court's discussion of the issue is set out as follows:

> Because the district court held extensive evidentiary hearings and made findings of fact, we review the findings of fact to determine whether they are 'clearly erroneous.'" [FN69] There is no evidence that they are. By far, the most difficult thing to understand is how, if Scott merely said that Elias had greeted her, two people came to believe he had suggested a bribe, jokingly or otherwise. There is no satisfactory explanation. The fact remains, however, that both jurors testified that whatever they thought Elias had said, he had said jokingly. They testified that it did not preoccupy them at the time, frighten them, or distract them from focusing on the evidence. In light of this, the district court's conclusion that Elias had not borne his burden [FN70] of showing juror bias appears correct. Accordingly, we affirm the district court's denial of Elias's motion for a new trial.

269 F.3d at 1020-1021. (Footnotes omitted).[5]

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[5] Both footnotes reference cases concerning the allocation of the burden in "juror bias" cases (*Sea Hawk Seafoods, Inc. v. Alyeska*

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All Elias had to show was that there was a "reasonable possibility" that this perceived *ex parte* contact by Elias affected the jury. The Ninth Circuit's puzzlement at how jurors came to believe that a greeting contained a bribe offer demonstrates that the Government did not demonstrate, beyond a reasonable doubt, that the attributed statement had no affect.

This Court should grant Certiorari to resolve the conflict between those Circuits which place the burden of demonstrating prejudice in a jury tampering case with the Defendant, and those which allocate the burden of demonstrating no prejudice to the Government.

II. CONCLUSION

This Court should grant a Writ of Certiorari.

RESPECTFULLY SUBMITTED this 17th day of September, 2002.

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Pipeline Serv. Co., 206 F.3d 900, 911 (9th Cir. 2000); *United States v. Hanley*, 190 F.3d 1017, 1030 (9th Cir. 1999); and *Dyer v. Calderon*, 151 F.3d 970, 975 (9th Cir.1998) (*en banc*)), where the burden is allocated to the defendant, rather than jury tampering cases.